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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

R. MARBURY STAMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 20, 1971.

OPINIONS BELOW

On September 22, 1967, the Petitioner, R. Marbury Stamp, along with five Co-defendants, was indicted in the United States District Court for the District of Columbia. Count One of the Indictment charged a conspiracy in violation of Title 18, U.S. Code, §371, to violate D.C. Code, §22-1301 (false pretenses) and §22-1401 (forgery); Counts Two through Thirteen charged substantive violations of D.C. Code, §22-1301. On May 20, 1969, a jury convicted the Petitioner, and four of the Co-defendants, on each of the thirteen Counts of the Indictment. On January 27, 1970, the United States District Court for the District of Columbia, Judge Aubrey Robinson, sentenced the Petitioner, R. Marbury Stamp, to incarceration for a period from twenty months to five years on Count One, with all but four months of said sentence of incarceration suspended, and to serve two years probation; and to serve two years probation on each of the twelve remaining counts consecutively to the sentence imposed on Count One. The Opinion of the United States District Court for the District of Columbia, denying motions to dismiss, appears as *United States v. Reynolds*, 300 F. Supp. 503 (Appendix 22A), and the opinion denying Motion for Judgment of Acquittal is printed in the Appendix (at page A28-36). On December 20, 1971, the United States Court of Appeals for the District of Columbia Circuit affirmed the Petitioner's conviction, which appeal was consolidated with the appeals of the four Co-defendants. The Opinion of the United States Court of Appeals for the District of Columbia Circuit, ___F.2d___, ___U.S.App.D.C.___, is printed in the Appendix (at page 1B-44B). On February 22, 1972, the United States Court of Appeals for the District of Columbia Circuit denied the Petitioner's Request for Rehearing.

JURISDICTION

The judgment of the United States District Court for the District of Columbia was entered on January 27, 1970. An Appeal was taken therefrom to the United States Court of Appeals for the District of Columbia Circuit which Appellate Court affirmed the judgment of the United States District Court for the District of Columbia, on December 20, 1971. A Petition for Rehearing was denied by the United States Court of Appeals for the District of Columbia Circuit on February 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1254 (1), time for filing having been extended by order of this Court, to April 22, 1972.

QUESTIONS PRESENTED

I. Was the Petitioner denied his liberty without due process of law as provided by the Fifth Amendment to the Constitution of the United States of America, when the Government procrastinated over three years before seeking an Indictment and five and one-half years before bringing the Petitioner to trial also in violation of the Petitioner's rights preserved by the Sixth Amendment to the Constitution of the United States of America?

II. Were the procedures employed by the Grand Jury in the United States District Court for the District of Columbia repugnant to the requirements of the Fifth Amendment to the Constitution of the United States of America, for presentment by indictment?

III. Was the Petitioner denied a fair trial as guaranteed by the Sixth Amendment to the Constitution of the United States of America, when the United States District Court for the District of Columbia, admitted evidence which had been unlawfully obtained from the Petitioner's Co-defendants in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, and when the United States District Court for the District of Columbia restricted the cross-examination of Government witnesses,

depriving the Petitioner of his right to be confronted by the witnesses against him?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America and the provisions of Title 18, U.S.Code, §371 and Title 22, D.C. Code, §1301 and 1401, are set forth in the Appendix hereto (at pages 1c-2c)

STATEMENT OF THE CASE

In 1963, the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice, in conjunction with the Internal Revenue Service, formed a special task force, known as "The Metro Project", to investigate corruption among public officials of Fairfax County, Virginia, (M.T. Vol. 1, 6/4/68, P. 32-34, 36-37; S.A. 1-3). By March, 1964, the Internal Revenue Service Agents were aware of the alleged criminal activities of the Petitioner, R. Marbury Stamp. The principal target of the Metro Project investigation was the Co-defendant, A. Clairbourne Lee, who was Chairman of the Fairfax County Board of Supervisors.

The purpose of the investigation by the Internal Revenue Service Agents, was not to conduct "routine audits" of the individuals suspected, but the investigation was intended to uncover criminal activities, (M.T.Vol.1, 6/4/68, P.49; J.A. 41-42). The information relating to the straw party deeds involved in this Indictment was a by-product of the bribery investigation. The straw party deals were known to I.R.S. Agent MacElroy before the investigation of the Co-defendant, Reynolds, was initiated, (M.T.Vol.1, 6/4/68, P.51-52, 59,69,133; J.A. 44; S.A. 3-4, 6). I.R.S. Agent Evangelus discussed the alleged forgeries of the straw parties' names with the Co-defendant, Harlan Freeman, in early

1964, yet the Government waited from January 21, 1964, until 1966 to decide to prosecute, since the zoning bribery cases were afforded priority to this conspiracy indictment, (M.T. Vol.1, 6/4/68, P. 74-75, 87, 134, 141, 181; Vol. 2, 6/5/68, P. 194, 200, 219, 226, 242; J.A. 58-59, S.A. 4).

The Internal Revenue Service did not notify the Petitioner, R. Marbury Stamp, that it was conducting a criminal investigation into his activities, although they audited his company records in early 1966. All of the documents which would have provided the basis of the defense of the Petitioner, R. Marbury Stamp, were destroyed when his office was moved in October, 1966, (M.T. Vol.2, 6/5/68, P.247-248, 252; S.A. 10-11). The Internal Revenue Service advised the other parties charged as Co-conspirators of the criminal nature of the investigation against them from January, 1964 thru March, 1966, (M.T., Vol. 2, 6/5/68, P.221,242,285; S.A. 8-9, 12). The investigation of this matter by the Metro Project was closed May, 1966, (M.T. Vol. 2, 6/5/68, P.318; S.A. 12), five months prior to the destruction of the records of the R. Marbury Stamp Co., but the Grand Jury herein was not convened until March 1, 1967, and the Indictment was not returned until September 22, 1967, (J.A., P.2). In pretrial motions the Petitioner, and the Co-defendants, moved to dismiss the Indictment alleging it was vague, indefinite and duplicitous, and on April 28, 1969, the Petitioner, and the Co-defendants, requested the United States District Court for the District of Columbia to dismiss the Indictment because the Court lacked jurisdiction in that the Grand Jury did not read the Indictment before issuing it, and only Counts One and Two were read to the Grand Jury by the prosecuting attorney, while none of the statutes involved were read to the Grand Jury. In addition thereto, the Indictment contained allegations which were not based upon any testimony that had been presented to the Grand Jury, but which information had been mistakenly supplied by the prosecuting attorney, (M.T. 4/28/69, P.17-19, 21, 29, 31; J.A. 61-77).

The Metro Project investigation revealed that the Reynolds Construction Company, of which the Co-defendant, Walter Reyonlds, was a principal, (T.T., Vol. 5, 5/13/69, P.598; J.A., P. 109), desired additional construction loans from the Eastern Savings and Loan Association of Washington, D.C. These loans could not be granted until the Reynolds Construction Company sold a number of homes upon which it had existing construction loans. The Petitioner, R. Marbury Stamp, a mortgage broker, was advised by the President of the Eastern Savings and Loan Association, (who died in 1967), to have the Reynolds Construction Company enter into straw party deals to effect this purpose, (T.T., Vol. 6, 5/15/69, P.682,; J.A. 114-116). This information was conveyed to the Co-defendants by the Petitioner. Thereafter, the Co-defendants, Harlan Freeman and Bertram Dinelt, obtained straw parties who were named Berry, Ashby, Reese, Sweat and Saperstein. Each of the straw parties received a $200.00 fee from the Reynolds Construction Company for acting as a straw party, (T.T., Vol. 2, 5/7/69, P.165,214,247,286, 309). Thereafter, the Co-defendant, Harlan Freeman, then completed credit statements and loan applications, forwarding them to the office of the Petitioner, R. Marbury Stamp, for processing with Eastern Savings and Loan Association. The Co-defendant, Harland Freeman, did not notify any of the other Co-defendants of his actions, keeping the $200.00 straw party fees in each deal for himself, (T.T., Vol. 6, 5/15/69, P.687; J.A. 117). The Co-defendant, Harlan Freeman, also supplied the signatures of the fictitious straw parties required to complete the transactions. Following the straw party transactions, the houses were transferred back to Co-defendant, Walter Reynolds, and his partner, who was not named as a Co-defendant, who made the mortgage payments to Eastern Savings and Loan Association until the houses were resold to third party purchasers. At the trial in the United States District Court for the District of Columbia, the straw parties each acknowledged that he had signed the necessary documents only as a straw party, with no intention to occupy the premises conveyed, including the deeds

reconveying the property back to the Co-defendant, Walter Reynolds. The Court instructed the jury, while the Government was presenting its case, that straw party transactions were not illegal, (T.T., Vol. 2, 5/7/69, P.302). The prosecution produced seven persons whose names were listed in the Harvard Alumni Directory, each testifying that he had never executed any of the documents in the different straw party transactions, (T.T., Vol. 3, 5/8/69, P.404,464, 466; T.T., Vol. 5, 5/12/69, P.479). The defense and the prosecution stipulated that if called, the remaining six fictitious straw parties, would supply substantially the same testimony, denying any knowledge of the straw party transactions, (T.T., Vol. 5, 5/13/69, P.594).

The prosecution presented two officials of the Eastern Savings and Loan Association, who testified to the general procedures followed by the Eastern Savings and Loan Association in granting loans, (T.T., Vol.2, 5/7/69, P.127; Vol. 4, 5/12/69, P.532; J.A., P.86, 95-97), but the Eastern Savings and Loan Association did not check on the credit information of the applicants, (T.T., Vol.4, 5/12/69, P.558; J.A. 104), and the United States District Court for the District of Columbia admonished the prosecution that proof of reliance by Eastern Savings and Loan Association would be required, (T.T. Vol.3, 5/8/69, P.349). The officials of Eastern Savings and Loan Association looked solely to the real property for security, (T.T., Vol. 4, 5/12/69, P.559; J.A. 104), and granted loans solely upon the basis of the real estate appraisal, (T.T. Vol.2, 5/7/69, P.135; J.A.91), and that Eastern Savings and Loan Association would not consider loan applications predicated on false sales, (T.T. Vol. 2, 5/7/69, P.532; J.A. 96). The Petitioner and the Co-defendants moved for a Judgment of Acquittal and the United States District Court for the District of Columbia questioned the failure of the prosecution to produce witnesses from Eastern Savings and Loan Association to supply direct testimony of reliance by the Savings and Loan Association upon the alleged false documents, (T.T. Vol. 5,

5/13/69, P.599-60, 635-637, 642-644, 654; J.A. 109-110). Following the denial of the Motion for Judgment of Acquittal, the Co-defendants, Walter Reynolds and Harlan Freeman, offered testimony and the Petitioner, and the remaining Co-defendants, rested, (T.T. Vol. 6, 5/15/69, P.662, 675, 682, 692; J.A. 111-117). The jury returned a verdict acquitting the Co-defendant, Bertram Dinelt, who was only charged in the first Count and convicting the Petitioner and the Co-defendants on all Counts, (T.T. Vol. 8, 5/20/69, P.735). Motions for Judgment N.O.V. and in arrest of Judgment were denied, (Appendix Pages 28-36).

HOW FEDERAL QUESTIONS ARE PRESENTED

Prior to trial in the United States District Court for the District of Columbia, Petitioner, and the five co-defendants, filed Motions to Dismiss the Indictment, alleging that the Indictment was improperly returned, in violation of the Fifth Amendment to the Constitution of the United States of America, in that no member of the Grand Jury read the Indictment prior to presentation to the Court. The Petitioner, also moved the Court to dismiss the Indictment alleging a deliberate prejudicial delay upon the part of the Government in presenting this matter to the Grand Jury denying the Petitioner due process of law as provided by the Fifth Amendment of the Constitution of the United States of America, and a speedy trial as provided by the Sixth Amendment to the Constitution of the United States of America.

At the trial in the United States District Court for the District of Columbia, the Court restricted the cross-examination of the Government witnesses, thereby denying the Petitioner, his right of confrotation of the witnesses against him provided by the Sixth Amendment to the Constitution of the United States of America.

In addition thereto, Petitioner, contends that the rights of his Co-defendants to be protected from unreasonable

searches and seizures as provided by the Fourth Amendment to the Constitution of the United States of America were abridged by the Government investigators and the introduction of the illegally obtained evidence against the Co-defendants in the trial in the United States District Court for the District of Columbia fatally tainted the Petitioners rights protected by the Fifth and Sixth Amendments to the Constitution of the United States of America.

REASONS FOR GRANTING THE WRIT

I. Petitioner, R. Marbury Stamp, artues that he was denied his liberty without due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States of America, and that he was denied a fair and speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

The alleged criminal activities for which R. Marbury Stamp was indicted occurred from May 24, 1962 to and including November 26, 1963, (Indictment, J.A. 6-25). Agents of the Internal Revenue Service had sufficient actual knowledge of the transactions which formed the basis for the Indictment, in March, 1964, (M.T., Vol. 1 6/4/68, P. 33-36, 134; Vol. 2, 6/5/68, P. 242, 264, 279, 287; S.A. 11-12).

However, the Government deliberately chose to delay the prosecution of these charges, giving precedence to criminal investigations involving zoning bribery cases, until May, 1966, when the Metro Project was terminated, (M.T., Vol. 1, 6/4/68, P. 134, 141, 181; Vol. 2, 6/5/68, P. 318; S.A. 12-13). A delay of twenty-six months occurred between the dates when the Government was definitely aware of the alleged criminal activities and the date of the conclusion of the investigation.

There was a four year lapse of time between the date of the first alleged criminal activity, May, 1962, and the conclusion of the investigation, May, 1966, and a six month pasaage of time between the date of the last alleged criminal activity

and the conclusion of the investigation. The Government allowed approximately eleven months to pass following the completion of its investigation, and the impaneling of the Grand Jury on March 1, 1967. The Indictment was not returned until September 22, 1967. All of the delay was attributable to the Government and was purposeful. The trial commenced on May 6, 1969, five and one-half years after the conclusion of the alleged conspiracy and nineteen months after the return of the Indictment. Petitioner alleges that the total elapsed time between the alleged offenses and the trial violated his rights under the Fifth and Sixth Amendments to the Constitution of the United States of America. During this period of time, the President of the Eastern Savings and Loan Association, with whom the Petitioner had dealt in negotiating for mortgages and construction loans for the Reynolds Construction Company, had died. During this passage of time, all of the Petitioner's records and documents were destroyed when the Petitioner moved his business office to another location. Had the Petitioner been advised of his criminal liability, at the time that he was under investigation, for a "civil tax audit" by the Internal Revenue Service Agents, he could have preserved these exculpatory documents to protect himself. Petitioner was not in any way forewarned of the sword of Damocles suspended above his head and he was rendered impotent to defend himself by the Government's chicanery. Other members of the alleged conspiracy were afforded their constitutional rights by the Government agents, but not the Petitioner.

This Court stated in the decision in *United States v. Marion*, ___ U.S. ___, 92 S. Ct. ___, 30 L.Ed. 2d 468, at Page 480, "Nevertheless, since the criminal trial is the likely consequence of our judgment and since Appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the Appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the

pre-indictment delay in this case caused substantial prejudice to Appellees' rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused.", and at Footnote 14, ". . . And their underlying rationale is 'to encourage promptness in the bringing of actions, that the party shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory".

It has been shown in this case that the Government had made a deliberate choice for a proposed advantage which caused as much oppressive delay and damage to the Petitioner, R. Marbury Stamp, as it would have caused had it been made in bad faith, *Petition of Provoo*, 17 FRD 183, 202, affirmed 350 U.S. 847. In this case, the delay was substantial and prejudice would have been presumed, had not the Petitioner introduced testimony at the pretrial motion to establish the prejudice, *Williams v. United States*, 102 U.S. App. D.C. 51, 53, 250 F.2d 19, 21.

In *Jackson v. U.S.*, 122 U.S.App.D.C. 14, 125, 351 F.2d 821, the United States Court of Appeals for the District of Columbia Circuit, stated, "In some cases, the length of that delay may be so great that prejudice can be presumed unless the Government can show otherwise. See *Hanrihan v. U.S.*, 121 U.S.App.D.C. 134, 348 F.2d 365 (1965). That we cannot presume prejudice after a delay of five months. Some showing is necessary.

"This is not to say that prejudice must be proved beyond a reasonable doubt, or even by a preponderance of the evidence . . . since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof, but he must still show a plausible claim."

"But unless delay is so long that prejudice can be presumed some evidence of prejudice must be produced."

Petitioner argues that he affirmatively demonstrated the prejudice accruing to him from this long delay in not being informed of the charges against him by the Internal Revenue

Service Agent who investigated his activities, and the long delay in obtaining an Indictment. At the pretrial Motion to Dismiss, the testimony of Mary Speed, an ex-employee of R. Marbury Stamp and Company, demonstrated that all of the Petitioner's records had been destroyed by her in October, 1966, six months after the completion of the investigation of this case by the Government. At no time was Petitioner notified that he was undergoing anything other than a "routine audit" by the Government investigators. The original straw party loan applications which had been received from the Walter Reynolds Construction Company by the R. Marbury Stamp Company, and which were the basis of the loan applications made by R. Marbury Stamp to the Eastern Savings and Loan Association were then inadvertently destroyed, (M.T. Vol. 2, 6/5/68 P.247-248, 252; S.A., 10-11). Therefore, Petitioner was prejudiced in being denied use of the documents which could have established that he acted in good faith, based upon signed loan applications bearing credit information which had been submitted to the R. Marbury Stamp Company by the Reynolds Construction Company. In addition thereto, the untimely death in 1967 of the President of the Eastern Savings and Loan Association, denied the Petitioner the use of the very witness who could have established that the Eastern Savings and Loan Association was aware of the straw party transactions and had actually suggested their use and did not rely upon any alleged forged or fraudulent documents. Eastern Savings and Loan Association was not defrauded out of one cent but actually made thousands of dollars in profit on these straw party transactions.

Thereupon, Petitioner argues that he was not only denied his liberty without due process of law as guaranteed by the Fifth Amendment, but he was also denied a fair and speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States of America.

II. Petitioner argues that he was not properly indicted by the Grand Jury in the United States District Court for the District of Columbia in violation of his rights provided by the Fifth Amendment to the Constitution of the United States of America.

At the pretrial hearing it was established that the Foreman of the Grand Jury certified the Indictment as a "True Bill", even though he had not read it and, to the best of his recollection, no other Grand Jurors had read it. The United States District Court for the District of Columbia rejected this Motion as untimely, *United States v. Reynolds,* 300 F.Supp. 503. In its opinion the District Court eschewed any comment on the merit of the motion. In affirming the action of the United States District Court on appeal the United States Court of Appeals for the District of Columbia Circuit, mis-read the transcript of proceedings. At Page 12 of the Slip Opinion, the Court states, "At the Pretrial hearing held on May 5, 1969, the Government Attorney testified as follows;

> 'The Government read through at the Grand Jury session prior to the return of the Indictment, the entire counts one and two. As was said my Mr. Mollenoff, [Co-counsel for the Government] and as specified to by the Grand Jury foreman, Mr. Swain, the remaining counts were reviewed thoroughly in detail count by count.' "

Petitioner argues that there was no "testimony" by the Government Attorney, Mr. Mollenoff, and that the excerpt relied upon by the Court below was, in fact, argument upon the Motion made by Bruce Burns, Esquire, Co-counsel for the Government, who was not an active participant in the case until the pretrial hearings upon motions were held, and who had no personal knowledge of any of the events or action of the Grand Jury. Petitioner further argues that the Grand Jury could not have reviewed the Indictment in its entirety since it was admitted by Counsel for the Government that there were allegations of fact contained in the very First Count of the Indictment for which there were no basis whatsoever and

there could not have been testimony presented to the Grand Jury to substantiate those allegations; the allegations having been supplied entirely by the Justice Department Attorneys, when they had the Indictment typed for presentation to the Grand Jury. And thereupon, Petitioner argues that he was not indicted by the Grand Jury as provided by the Fifth Amendment to the Constitution of the United States of America, but that the so called "Indictment" herein was merely an "Information" prepared by the Justice Department. Petitioner argues that the assertion that the Petitioner's motion to Dismiss was not timely made, or waived, is merely side-stepping the issue. The Petitioner had no way of ascertaining what transpired in the Grand Jury Room because of the cloak of secrecy which surrounds the Grand Jury proceedings and it was not until it was discovered that the Indictment contained allegations of fact which could have had no basis in any Grand Jury testimony that the Petitioner and the Co-defendants, were given the first inkling of any impropriety in the Grand Jury's failure to read and review the proposed Indictment. Petitioner should not be penalized for having failed to ascertain information which the Government had concealed from him.

III. Petitioner argues that he was denied his right of confrontation of the witnesses against him by the restriction of cross-examination by the United States District Court to the District of Columbia in violation of the Sixth Amendment to the Constitution of the United States of America.

The United States District Court for the District of Columbia prejudicially limited the cross-examination by the Petitioner's Counsel, and the Co-defendants' counsel, of both of the officers of the Eastern Savings and Loan Association relating to the specific loan transactions set forth in the Indictment which the Government alleged to have been fraudulent. The Government alleged the Eastern Savings and Loan Association relied upon the alleged forged and fraudulent documents and was thereby defrauded, although the Eastern Savings and Loan Association never lost a cent from

any of these transactions, but had, in fact, made a substantial profit on each transaction.

The Witness, Robert Stoy and the witness, Thomas Harrison, testified as Officers of the Eastern Savings and Loan Association regarding the general practices governing granting of loans, (T.T., Vol.2, 5/7/69, P.120-125, Vol. 4, 5/12/69, P.526, 530, 532, 545; J.A. 82-86, 95-99). The Court limited cross-examination by the Petitioner's Counsel and Counsel for the Co-defendants, to these general practices and would not permit cross-examination relating to the specific loan transactions involved in the Indictment, (T.T., Vol. 2, 5/7/69, P.127; J.A. 87). This cross-examination was essential to the defense since on against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine the witnesses who were allegedly defrauded on the vital issue of their reliance upon the alleged fruadulent representations or forged documents. To deny this right of cross-examination to the petitioners was clearly in violation of the Sixth Amendment guarantee to all defendants in criminal proceedings to confront the witnesses against them, *Riley v. Pincus,* 338 U.S. 269, at 276; 94 L.Ed. 63. The backbone of the defense was the claimed knowledge of Eastern Savings and Loan Association of the fictitious nature of the straw party transactions and the failure of the Government to prove reliance by Eastern Savings and Loan Association upon any alleged false or fraudulent straw party deed, (T.T., Vol. 6, 5/15/69, P. 682; J.A. 114-115). Thereupon, Petitioner argues that he was deprived of his rights provided by the Sixth Amendment to the Constitution of the United States of America.

The evidence leaves no question that the Co-defendant, A. Clairborne Leigh, the Fairfax County Supervisor, was suspected of crime from the very inception of the government's investigation of his books and papers and that the investigation was a criminal investigation for bribery, conceivably encompassing, but clearly extending far beyond, mere tax liability. Leigh's papers included books and papers which

involved all the Co-defendants, including the Petitioner. The investigation of the Petitioner and the Co-defendants, Reynolds and Rogers and Freeman was the fruit of the investigation of Leigh. It is conceded that, until the government had obtained the evidence it desired, neither Leigh, Freeman, Reynolds, nor any other defendant was advised that there was in fact a criminal investigation under way. When the warning was ultimately given, too late, the criminal investigation was misrepresented as an investigation related soley to taxes.

The United States Court of Appeals for the District of Columbia found no fault with this procedure.

The Court of Appeals concluded that the Government may utilize the civil tax audit procedures of the Internal Revenue Service, including the compulsory provisions of 26 U.S. Code, § 7602, to initiate and carry out an investigation known from its inception by the "Metro Project" to be a criminal investigation not limited to possible tax liability. That ruling has decided an important question of Constitutional law which has not been, but should be, settled by this Court and, moreover, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals conceded that, even when an investigation that actually begins innocently as a civil audit later develops into one in which "the agent does suspect fraud . . . and is seeking to uncover evidence of wrongdoing for a possible criminal prosecution," there is some conflict in the decisions on the questions whether the government has a duty to disclose the changed nature of its investigation (Appendix Pages B29-31). *Application of Bodkin*, 165 F. Supp. 25 (EDNY 1958). *United States v. Guerrina*, 112 F. Supp. 126 (ED Pa. 1953), modified 126 F. Supp. 609 (ED Pa. 1955). See also *United States v. Lipshitz*, 132 F. Supp. 519 (EDNY 1955), *United States v. Wolrich*, 129 F. Supp. 528 (SDNY 1955) and *United States v. Wheeler*, 147

F. Supp. 945 (ED Ky. 1957), reversed and remanded on procedural grounds 256 F.2d 745 (3 CA, 1958).

Thus, even in the Court of Appeals' blinkered view of the facts, there is an important unresolved constitutional issue. The record here is clear, however, that this was no routine income tax investigation that accidentally revealed the potentiality for criminal prosecution. This was an instance in which (1) the investigation was initiated as a criminal investigation known as the "Metro Project"; (2) the criminal investigation was far broader than a mere investigation of income tax violations; (3) the Government knowingly, willfully, and deliberately avoided utilizing Internal Revenue special agents and avoided revealing the true nature of the investigation until after it had surreptitiously obtained the evidence of crime that it sought; and (4) the crimes ultimately charged were not even tax crimes–they were essentially local, District of Columbia "common law" crimes.

Moreover, the ultimate conclusion of the United States Court of Appeals for the District of Columbia Circuit on the suppression of evidence issue, depended upon the conclusions that Leigh, Reynolds, Rogers and Freeman were not entitled to Fourth and Fifth Amendment protections in this case because they "were not the uninitiated who could be said to be unaware of the possible consequences of a civil tax audit . . . " and that,

> "when dealing with persons as sophisticated as the defendants and appellants in our case it is not possible to believe that they lacked full realization that the civil tax audit *could ripen into a tax fraud investigation and, in light of these acts, a criminal non-tax probe.* While the normal taxpayer might not suspect the possibilities of this occurring we are not dealing with the ordinary taxpayer but rather with people well versed in finance, taxation and the law." (Appendix B, pp. 33, 38, emphasis added.)

The flaws in the quoted conslusions which denied the Codefendants equal protection under law, are obvious,

serious, and require the exercise of this Court's power of supervision; this aspect of the decision below represents a substantial departure from the accepted and usual course of judicial proceedings in a variety of aspects:

(1) The quoted conclusion on an issue of suppression of evidence depends upon a *post hoc, ergo propter hoc* view of constitutional protection; upon a "presumption of guilt". The Court of Appeals says in practical effect that (a) when subjected to a civil tax audit (and despite a lack of apparent criminal overtones), the taxpayer must first assume that he is guilty of tax fraud whether or not he believes himself to be guilty and that any Internal Revenue Agent conducting a civil tax audit is also an investogator of tax crimes as well as a general criminal investigator; and (b) any taxpayer who believes that he may conceivably be involved in any possibly criminal activity of no matter what description, state of federal, must resist the civil tax audit despite the compulsory provisions of 26 U.S.C. § 7602. Anyone subject to a civil tax audit who sees no possibility of a criminal prosecution stemming from the civil audit is thus deprived of constitutional protection because he has guessed wrong about the ultimate legal consequences of acts uncovered by the audit.

(2) The Court of Appeals held that constitutional protections provided by the Fourth and Fifth Amendments are to be applied in a discriminatory manner based upon the business, professional, economic, or educational standing of particular defendants; the "sophisticated" person who permits a civil tax audit is entitled to a lesser degree of protection than the "unsophisticated" despite the fact that neither may believe himself guilty of any crime at the time the civil audit is initiated. If any discrimination based on those criteria were otherwise reasonable, it would presumably be a discrimination favoring the lawyer, the real estate dealer, the accountant, etc., on the grounds that, unlike laymen, they may be more likely to recognize that revenue special agents are concerned with criminal audits. It is far more likely that the layman will fail to make the distinction

between the two and assume that any IRS investigation may well be a criminal one.

Petitioner argues that he was denied a fair trial and due process of law provided by the Fifth and Six Amendments to the Constitution of the United States of America when his trial was tainted by the admission of this evidence against his Codefendants, when that evidence was obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America. Petitioner argues that under the "fruit of the poison tree" doctrine of *Wong Sun v. U.S.*, 371 U.S. 471, the evidence obtained from the Co-defendants as a result of unreasonable searches and seizures, without search warrants, and without having advised the Co-defendants of their rights when the criminal investigation was pointed towards them, as provided by *Miranda v. Arizona*, 384 U.S. 436, which were obtained from the Co-defendants by the Internal Revenue Service Agents by trick, under the subterfuge that a "routine tax audit" was being conducted rather than a criminal investigation, poisoned the entire proceedings in the United States District Court for the District of Columbia. This evidence should have been suppressed at the Pretrial Motion and these convictions should not have been affirmed on Appeal because of the denial of the Fourth and Fifth Amendment rights of the Co-defendants in the Courts below and the resulting prejudice to the Petitioner from the introduction of this evidence against the Co-defendants, which reflected upon the Petitioner in this "conspiracy" case, in violation of the Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States of America.

CONCLUSION

In summary, Petitioner argues that he was denied his liberty without due process of law as provided in the Fifth Amendment to the Constitution of the United States of America and he was denied a fair and speedy trial and the right to confront and cross-examine the witnesses against him

as provided by the Sixth Amendment to the Constitution of the United States of America. This Court, thereupon, should issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to remedy this injustice and to uphold the Constitution of the United States of America.

Therefore, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted:

Stanley M. Dietz

Attorney for Petitioner
R. Marbury Stamp

APPENDIX A

1. District Court's Opinion Denying Defendants' Motion to Suppress.

September 5, 1968.

AUBREY E. ROBINSON, JR., District Judge.

Defendants have been charged in a thirteen-count indictment with violating Section 371 of Title 18 of the United State Code and Section 1301 and Section 1401 of Title 22 of the District of Columbia Code by conspiring to obtain loans from the Eastern Savings and Loan Association of the District of Columbia by uttering forged documents. Defendants have filed Motions to Suppress documentary evidence and oral statements. A hearing on the motions to suppress was held on June 3 and 4, 1968, at which time testimony was taken and additional evidence received. Transcripts of the hearing have been filed. Defendants vigorously contend that each was not adequately advised of his constitutional rights under the Fourth, Fifth and Sixth Amendments of the Constitution of the United States.

From the evidence, the following facts are found:

(1) Prior to the year 1963, the Internal Revenue Service and the United States Department of Justice formed a special project to investigate alleged bribery among certain officials of the County of Fairfax, Virginia. Specific focus was directed to the Fairfax County Board of Supervisors, of which the Defendant, A. Clairborne Leigh, was formerly chairman. This special project was known as the "Metro Project." It was staffed by revenue and special agents of the Internal Revenue Service and received legal assistance from the Justice Department through its Organized Crime and Racketeering Section.

(2) In June of 1963, William Hansell, a revenue agent of the Internal Revenue Service, was directed by the Director of the "Metro Project", Mr. Oral Cole, to make an exam-

ination of the income tax return of Defendant Leigh for the tax year 1960. In connection with that examination, copies of cancelled checks, bank statements and deposits in Leigh's files were made by the agent with Leigh's permission. At this time, no mention was made by the agent of any criminal investigation or of the "Metro Project." On January 20, 1964, Special Agent McElroy of Internal Revenue Service, accompanied by Agent Hansell, visited Defendant Leigh's office. At that time, Defendant Leigh was first advised of his rights and, subsequent to that date, information was obtained from Leigh pertaining to settlement files on property transactions involving the Reynolds Construction Company. These settlement files were scrutinized in detail by the "Metro Project" investigators.

(3) Prior to June of 1963, Defendants Leigh and Rogers had been law partners. At the time of Agent Hansell's first visit to the office of Defendant Leigh, the office files and records of the partnership were partially in the possession of Rogers, the law partnership having been previously dissolved. Unable to secure all of the desired information concerning the records of the Leigh and Rogers partnership from the files in possession of Leigh, Special Agent McElroy went to the office of Defendant Rogers in February, 1964. McElroy informed Rogers that Leigh was being investigated and that he wanted access to the Leigh and Rogers partnership records which were in the possession of Rogers. At this time, Special Agent McElroy did not give to Rogers any warning concerning his constitutional rights. He received from Rogers certain documents consisting of settlement files from the Leigh and Rogers partnership. In October and November, 1964. McElroy conferred with Rogers concerning the "straw" transactions involving Reynolds Construction Company. In April of 1965, Internal Revenue Agent Shelton was assigned to audit the personal tax returns of Rogers.

(4) In order to ascertain the details of financial transactions between Leigh and Reynolds pertaining to certain

properties and sales contracts, Internal Revenue Agent Evangelist of the "Metro Project" was instructed to make an audit of certain tax returns of Reynolds Construction Company, a corporation of which Defendant Reynolds was the president. The personal returns of Walter J. Reynolds and his wife were also audited. The audit commenced in March, 1964. All corporate financial records of the Company were obtained from Reynolds on request. Reynolds was given no warnings pertaining to his constitutional rights at this time.

(5) The audit of the Leigh and Rogers settlement files revealed that Defendant Harlan Freeman had received fees in connection with certain "straw" transactions which were of great interest to the "Metro Project" in connection with its investigation of Leigh. Agent Evangelist, contemporaneous with his audit of the Reynolds Construction Company, began an audit of Freeman's tax returns on July 6, 1964. Freeman was advised by Special Agent F. O. Stevenson on February 11, 1966, as to his constitutional rights as a subject of a criminal investigation.

(6) No agent of the Internal Revenue Service examined or removed any books, records or other documents from Defendant Stamp or Defendant Dienelt in relation to facts involved in the present indictment. Nor did any agent interview either of these defendants with regard to the transactions involved in this indictment. The Defendant Stamp's books were audited in 1964, but the material examined was entirely unrelated to the present indictment.

Defendants Leigh, Rogers, Reynolds and Freeman make two separate but related arguments in support of their motions to suppress. First they assert that each was entitled to "*Miranda* warnings"[1] of his constitutional rights

[1] In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Supreme Court held that a criminal suspect ". . . must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, *supra* at 479.

at the time of the government agent's initial visit, or at least at some point prior to the time at which such warnings were given, and that failure to give these warnings was a violation of defendants' Fifth and Sixth Amendment rights. Secondly, because "Metro Project" was created to investigate criminal bribery, defendants argue that representations by the Government that its purpose was to make civil tax audits constituted fraud and deceit in the use of the statutory authority granted by Section 7602 of the Internal Revenue Code,[2] and that the inspection of books and records under the guise of the authority granted by that statute constituted unconstitutional searches and seizures under the Fourth Amendment. Defendants Stamp and Dienelt assert that indictments against them were obtained as the result of evidence unlawfully secured from Defendants Leigh, Rogers, Reynolds and Freeman and are thus tainted by the unconstitutional actions of the Government. They, therefore, rely on the arguments of their co-defendants in support of their motions to suppress.

The Government responds, first, that while there is always the possibility that criminal prosecutions may result from

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[2] Section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1964), provides: For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

a civil tax audit, there is no need to give "*Miranda* warnings" at the initial stages of a tax investigation. In addition, it asserts that since its original purpose in seeking information from Defendants Rogers, Reynolds and Freeman was in connection with its investigation of Leigh, that Rogers, Reynolds and Freeman were not, in the early stages of the investigation, entitled to "*Miranda* warnings." Secondly, the Government argues that there was no misrepresentation of the Government's purpose to any of the defendants, because "Metro Project" was legitimate investigatory machinery created for the dual purpose of investigating taxpayers' returns and seeking information about bribery among public officials in Fairfax County.

For purposes of analysis, the *Miranda* argument and the search and seizure issue are approached separately.

We hold that in a tax investigation "*Miranda* warnings" are required when that investigation reaches the accusatory stage. At that point, our adversary process begins to operate and the potential defendant must be advised of his constitutional rights. *See Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Turzinski*, 268 F.Supp. 847 (1967). In the case at bar, agents of the Internal Revenue Service advised defendants of their rights at the appropriate times under this test.

In *Escobedo*, the Court held

> . . . that where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . and that no state-

> ment elicited by the police during the interrogation may be used against him at a criminal trial. *Escobedo* v. *Illinois, supra* at 490-91.

The Court went on to note:

> We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer. *Escobedo* v. *Illinois, supra* at 492.

These concepts were developed more fully in *Miranda*, where the Court held:

> . . . the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda* v. *Arizona, supra* at 444.

Then in an already-famous footnote, the Court added, "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Miranda* v. *Arizona, supra* at 444 n. 4.

The threshold question is whether the *Escobedo-Miranda* doctrine can ever apply to criminal tax investigations. The great majority of federal courts which have considered this question, including several courts of appeal, have held that *Miranda* and *Escobedo* do not apply to tax investigations unless the taxpayer is actually in custody or deprived of his freedom in some significant way, that is, unless the strictly construed elements of *Miranda* are present. *Spinney* v. *United States*, 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *Frohmann* v. *United States*,

380 F.2d 832 (8th Cir.), *cert. denied*, 389 U.S. 976 (1967); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967); *United States* v. *Maius*, 378 F.2d 716 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); *United States* v. *Mancuso*, 378 F.2d 612, *modified*, 387 F.2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); *Selinger* v. *Bigler*, 377 F.2d 542 (9th Cir.), *cert. denied*, 389 U.S. 904 (1967); *Morgan* v. *United States*, 377 F.2d 507 (1st Cir. 1967); *Rickey* v. *United States*, 360 F.2d 32 (9th Cir.), *cert. denied*, 385 U.S. 835 (1966); *Kohatsu* v. *United States*, 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966); *United States* v. *Spomar*, 339 F.2d 941 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965); *United States* v. *Jaskiewicz*, 278 F.Supp. 525 (E.D.Pa. 1968); *United States* v. *Mackiewicz*, 274 F.Supp. 805 (D.Conn. 1967); *United States* v. *Neves*, 269 F.Supp. 158 (S.D.N.Y. 1967); *United States* v. *Gleason*, 265 F.Supp. 880 (S.D.N.Y. 1967); *United States* v. *Hill*, 260 F.Supp. 139 (S.D. Cal. 1966); *United States* v. *Fiore*, 258 F.Supp. 435 (W.D.Pa. 1966).[3]

In rejecting the application of *Escobedo* and *Miranda* to tax crimes, most of these cases attempt to distinguish tax

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[3] The only recent comment by the Supreme Court about the rights of suspects of tax crimes to be advised of their constitutional rights, *Mathis* v. *United States*, 391 U.S. 1 (1968), involved a case where petitioner was in jail for an entirely separate offense when documents and oral statements were obtained from him by an Internal Revenue Agent. Thus, it was unnecessary for the Court to determine whether physical custody was a prerequisite to the application of *Miranda* principles to tax cases, for in this unusual case there was physical custody. The Court held only:

> It is true that a "routine tax investigation" may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution. We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person in custody. *Mathis*, *supra* at 4.

investigations from other criminal cases. Some hold that "*Miranda* warnings" are not required because of the difficulty in determining the inception of the adversary process, that is, because the distinction between the investigatory and the accusatory stages "may not be entirely apposite to criminal tax investigations." *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D.Pa. 1966). Other courts find an important difference in the fact that in the normal criminal investigation a crime is known to have occurred and the police are seeking a suspect, while in the tax case the suspect is known and what must be determined is whether a crime has actually been committed. *Kohatsu* v. *United States*, 351 F.2d 989 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966). These courts hold that this distinction obviates the requirement of giving "*Miranda* warnings" in tax cases. *See* Note, 21 S.W.L.J. 399 (1967). Most courts which have held the "*Miranda* warnings" unnecessary have limited the requirement to situations in which the subject is in physical custody. This reasoning is based on what one court referred to as the "clear intendment" of *Miranda* that the requirement of a warning is "to be confined to situations of 'custodial interrogation'." *United States* v. *Fiore*, 258 F.Supp. 435, 440 (W.D.Pa. 1966).

The illogic of these artificial distinctions between investigations for tax crimes and investigation for other crimes is apparent. As in other criminal cases, there comes a time in the criminal tax investigation when the focus is on a prime suspect of a specific crime. There comes a time when the process passes from the investigatory stage to the accusatory stage. At that point, however ill-defined, the suspected tax criminal is no less entitled to be advised of his constitutional rights than any other suspected criminal. *United States* v. *Wainwright*, 284 F.Supp. 129 (D.Colo. 1968); *United States* v. *Turzynski*, 268 F.Supp. 847 (N.D. Ill. 1967); *United States* v. *Kingry*, 19 A.F.T.R.2d 762 (N.D.Fla. 1967); *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 348 (D.Ariz. 1966). Judge Will's Memorandum Opinion

in *United States* v. *Turzynski, supra,* is an excellent analysis of the reasoning which compels this conclusion. The opinion states:

> We hold that once a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant. Any evidence obtained from him is admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his constitutional rights and privileges. *Escobedo* v. *State of Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
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> To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale or [sic] narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a price suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes. *United States* v. *Turzynski, supra* at 850-51.

Turzynski refuted the two major arguments against application of *Escobedo-Miranda* principles to tax cases. First, it criticized the distinction between the case where the criminal is unknown and the case in which the crime is unknown, since the purpose of the interrogation, in both instances, is to incriminate the suspect being questioned. *United States* v. *Turzynski, supra* at 852-53.

> This distinction between a criminal tax investigation where the taxpayer is suspected of a tax fraud not yet fully identified and a criminal investigation where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has

> begun, i.e., when the investigative machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. *United States* v. *Turzynski, supra* at 852.

Secondly, *Turzynski* condemned the tendency of many courts to give the concept of custody "an independent constitutional significance which is belied by a careful reading of the opinion [*Miranda*]." *United States* v. *Turzynski, supra* at 852. The court reasoned that *Escobedo* and *Miranda* were not intended to raise the requirement of custody to a constitutional level. Rather, they had been concerned with the inception of the adversary process. *United States* v. *Turzynski, supra* at 853. *See* Note, 53 Iowa L. Rev. 957, 961 (1968). Judge Will noted that the Supreme Court in *Miranda*

> . . . was not concerned solely with the protection of constitutional rights in a custodial atmosphere. The Court enunciated the broader principle that when the investigative power of the government is directed toward an individual with the intent to obtain incriminating evidence from him, that individual should be afforded an opportunity knowledgeably to exercise his constitutional rights. *United States* v. *Turzynski, supra* at 852.[4]

The better reasoned point of view requires "*Miranda* warnings" in criminal tax cases, despite the absence of

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[4] In commenting on the irrelevance of custody to tax crimes, one commentator has noted:

> With respect to many white-collar crimes, such as tax frauds, it is likely that the Court will revert to the broader *Escobedo* test in determining the point at which the adversary process begins. In that event, physical restraint would not be regarded as prerequisite to application of the *Miranda* safeguards.
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> . . . Plainly, the privilege against self-incrimination is seriously in jeopardy throughout a criminal tax investigation. The absence of physical restraint does not obviate or minimize the need for safeguards to protect the privilege. Liption, *Constitutional Rights in Criminal Tax Investigations*, 53 A.B.A.J. 517, 518-19 (1967).

physical custody, when the accusatory stage is reached and the adversary process begins to operate.

Recognizing that differences between criminal tax cases and other types of criminal cases should not prevent application of the *Miranda-Escobedo* doctrine at the proper time in tax cases, we have established the proposition that *Miranda* should not be applied mechanistically so as to require warnings of constitutional rights only when there is actual physical custody. Such a view would virtually preclude the giving of these warnings in tax cases, because physical custody is rarely a stage in the process. Similarly, we reject the application of yet another mechanical approach in place of custody in order to determine when the adversary process begins [sic], namely the entrance into the case of the Internal Revenue special agent. Unfortunately, a narrow reading of *Turzynski* permits the inference that entrance of the special agent marks the clear line between the investigatory and the accusatory stages, for *Turzynski* holds that

> . . . once a taxpayer becomes the subject of a criminal tax investigation, *as evidenced by the referral to the Intelligence Division or otherwise*, our adversary process of criminal justice has become directed against him as a potential criminal defendant. *United States* v. *Turzynski*, *supra*, at 850. (Emphasis added.)

While referral to the Intelligence Division and the resultant involvement of the special agent may, in many cases, signify the inception of the adversary process, it would be too great an extension of *Miranda* to automatically require warnings of constitutional rights at this point. *Turzynski* was not concerned primarily with constitutional questions which are said to arise simply because the special agent enters the picture. It, like *Miranda*, was concerned with the "broader principle" that when the investigative power of the government focuses on the individual "with the intent to obtain incriminating evidence from him, the individual should be afforded an opportunity knowledgeably to

exercise his constitutional rights." *United States* v. *Turzynski, supra* at 852. This point in time may or may not coincide with the entrance into the case of the special agent. As one court properly noted:

> Although a Special Agent is the police arm of the Internal Revenue Service and conducts inquiries for possible criminal violations, the mere entry of such an agent into the case does not transform it from an investigatory status to an accusatory one. *United States* v. *Gower*, 271 F.Supp. 655, 659 (M.D.Pa. 1967).

We reject defendants' argument that they were entitled to be warned of their constitutional rights at the outset of the investigation merely because special agents of the Internal Revenue Service were involved in "Metro Project" from the beginning. Defendants were entitled to such warnings only when the investigative power of the government focused on them as prime suspects of criminal activity, that is, at the inception of the adversary process. To determine when that process began, the pertinent inquiry is not whether special agents were involved but whether the evils which *Miranda* sought to eliminate were a real threat to defendants and to their constitutional rights.

Miranda sought to guard against "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Miranda* v. *Arizona*, 384 U.S. 436, 445 (1966). It was concerned with the police tactic of thrusting one into unfamiliar surroundings, shrouded in privacy and secrecy, where there is coercion inherent in the very atmosphere. *Miranda* v. *Arizona*, *supra* at 449-50, 457. It recognized that coercion can be psychological as well as physical, and that psychological pressures can often be as dangerous as physical pressures.[5]

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[5] Indeed, the psychological pressures can be greater in tax cases than in most criminal cases, for "[t]he suspected tax evader is less likely to realize the consequences of cooperation than is the individual who is arrested and taken into custody for committing a violent crime." Note, 20 Ala.L.Rev. 158, 162 (1967).

Miranda v. *Arizona, supra* at 436, 448. In addition, *Miranda* was concerned with whether, in light of these psychological factors, the individual was "deprived of his freedom of action in any significant way." *Miranda* v. *Arizona, supra* at 444. As in other criminal cases, it is these evils which must be combated in the criminal tax case.

We find that the evils which *Miranda* sought to eliminate were not present in the instant case at the times when defendants contend that they were entitled to be advised of their constitutional rights. At the initial contacts with defendants by Internal Revenue agents, the general atmosphere was not coercive by its nature, for the interviews were held "not in some alien environment," but in defendants' own offices. *O'Toole* v. *Scafati*, 386 F.2d 168, 170 (1st Cir. 1967), *cert. denied*, 390 U.S. 985 (1968). *See also United States* v. *Essex*, 275 F.Supp. 393, 398 (E.D.Tenn. 1967). There is nothing to indicate that defendants had been deprived of their freedom of action in any way or were not free to leave the interviews (or ask Internal Revenue agents to leave) at any stage. Indeed, they went about their personal business, unfettered, between interviews with government agents. *See Hicks* v. *United States*, 127 U.S. App. D.C. 209, 212-13, 382 F.2d 158, 162 (1967); *United States* v. *Knight*, 261 F.Supp. 843, 844 (E.D.Pa. 1966). Defendants in the case at bar were in much the same situation as the defendant in *United States* v. *Hill*, 260 F.Supp. 139 (S.D.Cal. 1966), where the suppression motion was denied:

> Defendant in the instant case was never "deprived of his freedom of action in a significant way." . . . His meetings with the agents were by appointment only; except for the occasion on which the constitutional warnings were given, all meetings were in defendant's offices; he was free to come and go as he pleased and in fact did tend patients while his records were being reviewed. This situation is in direct contrast with the techniques of interrogation described in various police manuals relied upon in *Miranda*.
>
> . . . .

> . . . They told the defendant that they wished to examine his financial records in order to effectively investigate his tax returns. The defendant was under no compulsion. He voluntarily produced his records and answered the good-faith questions put to him by the agents. *United States* v. *Hill, supra* at 142-43.

In sum, until the accusatory stage is reached and the underlying evils which *Miranda* sought to combat are present, warnings of constitutional rights are not required. The mere fact that criminal prosecutions may result from a civil tax audit does not trigger the inception of the accusatory stage. It is not until there is a prime suspect of a specific crime, and the tactics condemned by *Miranda* are likely to be employed to obtain self-incriminatory statements or records, that the accusatory stage is reached. This test is difficult to apply in tax cases, but it is nevertheless the applicable standard under *Miranda* and *Escobedo*.

> The cases assume that interrogation is relatively free as between government and taxpayer until some ill-defined zone is reached in which fairness requires the government to alert the defendant that the theoretical risk of a criminal prosecution implicit in any investigation of an imperfect return has become a matter of pointed interest on the part of the government, whether or not the government has resolved to proceed. At some point the Government's further questions may become an attempt to take testimony in aid of prosecution rather than as part of an investigation. *United States* v. *Carlson*, 260 F.Supp. 424, 428 (E.D.N.Y. 1966).

In the instant case, however, defendants argue that there was more than the mere possibility that criminal prosecutions would follow the civil tax audits. They point to the existence of "Metro Project" as evidence of this. So far as their *Miranda-Escobedo* arguments are concerned, the Court need only note that those cases were in no way intended to "preclude police from carrying out their traditional investigatory functions." *Miranda* v. *Arizona*, 384

U.S. 436, 481 (1966). *See also, Escobedo* v. *Illinois*, 378 U.S. 478, 492 (1968). "Metro Project" was a tax-related investigatory technique in the spirit of police investigatory methods left intact by *Miranda*.[6]

From the foregoing analysis, it follows that "*Miranda* warnings" are required in tax cases only when the underlying evils which *Miranda* sought to guard against arise. In each case, the Court must inquire as to when the process passed from the investigatory to the accusatory stage, when the defendants became prime suspects of specific crimes, when they were subjected to the psychologically coercive atmosphere of government interrogation or demands for financial records, and when their freedom of action was significantly infringed. When one or more of these situations exist, the Internal Revenue Service is required to warn defendants of their constitutional rights, for it is then that the Service knows or reasonably should know of the likelihood of criminal involvement in particular transactions which may become the subject of an indictment. Viewing *Miranda* in this light, we hold that Defendants Leigh, Rogers, Reynolds and Freeman were not entitled to be advised of their constitutional rights at the time of the first contact with them by the Internal Revenue Service or, indeed, at any point in time earlier than that at which such warnings were in fact given.

When Defendant Leigh was first contacted by the Internal Revenue Service in June of 1963, attention had not focused on him as the suspect of a particular crime. The primary purpose of Agent Hansell's visit to Leigh's office was to make a civil tax audit. At this initial meeting, there was no coercion of any kind nor any of the other evils condemned in *Miranda*. In December of 1963, Agent Hansell first thought he might have uncovered evidence of crime in Leigh's books. As a result he referred the case to the In-

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[6] We shall consider the relevance of the existence of "Metro Project" to defendants' Fourth Amendment rights *infra*, at pp. 23-28.

telligence Division. While Hansell suspected a crime, to wit bribery, different from the crime for which Leigh was ultimately indicted, the accusatory stage had nevertheless been reached. At any subsequent interview, the Government would be searching for evidence of crime and might employ the tactics condemned in *Miranda*. The underlying concerns of *Miranda* were now present as to Defendant Leigh. At the very next interview with Leigh, on January 20, 1964, the Government properly advised him of his constitutional rights. This was the first point in time when "*Miranda* warnings" were required. Since the evidence which Defendant Leigh seeks to have suppressed was all acquired prior to this time, his motion must fail on Fifth and Sixth Amendment grounds.

The original purpose of Internal Revenue Service interviews with Defendants Rogers, Reynolds and Freeman was in connection with the criminal investigation of Leigh. The Service was conducting bona fide civil audits of Rogers, Freeman and Reynolds, with the additional purpose of determining whether their returns reflected any transactions with Leigh which might aid in its investigation of Leigh. However, Rogers, Reynolds, and Freeman were not the subjects of criminal investigations, even though they were contacted, in some instances, by special agents rather than by revenue agents. As a result, the evils with which *Miranda* was concerned had not yet arisen,[7] and there was no requirement of advising Rogers, Reynolds and Freeman of their constitutional rights.

In March of 1964, the Internal Revenue Service, from documents they had received from Rogers, Reynolds and Leigh, became aware of certain "straw" transactions involving these defendants and Leigh. At this point, however, it had no reason to believe that criminal conduct was

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[7] The record indicates that the initial contact by agents of the Internal Revenue Service with Defendants Rogers, Reynolds and Freeman occurred in February 1964, March 1964 and July 1964, respectively.

involved in these transactions, but thought that they might be relevant to its bribery investigation of Leigh. When the Government sought to ascertain further details of the "straw" transactions, it discovered that several of the "straw" parties had no knowledge of the transactions and had not signed the documents. This development occurred in December, 1965. For the first time, the Government realized that the documents it had obtained in connection with civil tax audits of Rogers, Reynolds and Freeman, and in furtherance of its bribery investigation of Leigh, were permeated with evidence of criminal forgery, the subject of the present indictment.

It is at this point, December of 1965, and not sooner, that the accusatory stage was reached as to Defendants Rogers, Reynolds and Freeman. Only then did these three defendants become prime suspects of criminal activity. At any subsequent interviews with these defendants, the Government would be searching for evidence of crime and might employ the tactics condemned in *Miranda*. Indeed, at the very next interviews with Defendants Rogers and Freeman, March 22, 1966 and February 11, 1966 respectively, the Government advised them of their constitutional rights. The record shows no interview with Defendant Reynolds subsequent to December, 1965. Since the evidence which these defendants seek to have suppressed was all acquired prior to these dates, their motions must fail on Fifth and Sixth Amendment grounds.

Defendants' second argument is based on the Fourth Amendment's prohibition against unreasonable search and seizure. They contend that the very existence of "Metro Project" indicates that the original purpose of the Internal Revenue Service was to investigate criminal activity, that representations by the Government that its purpose was to make civil tax audits therefore constituted fraud and deceit in the use of the statutory authority granted by Section 7602 of the Internal Revenue Code, and that the inspection of books and records under the guise of the authority

granted by that statute constituted unconstitutional searches and seizures.

Defendants are correct in asserting that a search for criminal conduct under the guise of an examination for purely civil purposes is unconstitutional. *United States* v. *Guerrina*, 112 F.Supp. 126 (E.D.Pa. 1953), *modified on other grounds*, 126 F.Supp. 609 (E.D.Pa. 1955); *United States* v. *Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955). As Judge Clary noted in *Guerrina:*

> I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes . . . [Defendant] was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes. *Guerrina, supra* at 129.

However, the record in the instant case does not support the contention that a civil tax statute was used in a deceitful manner to obtain evidence in a criminal investigation. There was no unreasonable search and seizure under the Fourth Amendment of the Constitution.

Section 7602 of the Internal Revenue Code is a civil tax statute which provides, in part:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> . . .

If the Internal Revenue Service used the civil investigatory authority granted them by this statute for the investigation of purely criminal matters, suppression of the evidence so obtained would be required. However, if the Government was interested in *both* civil tax liability and criminal conduct, or solely in civil tax liability which later gave rise to evidence of crime, it was proper to operate under the authority of Section 7602. *McGarry* v. *Riley*, 363 F.2d 421 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966); *Wild* v. *United States*, 362 F.2d 206 (9th Cir. 1966); *United States* v. *Sclafani*, 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959); *Boren* v. *Tucker*, 239 F.2d 767 (9th Cir. 1956). "It should be noted that the statute under consideration [§ 7602], by its language does not limit the examination it authorizes *solely* to the issue of correctness." *Boren, supra* at 772. Referring to another paragraph of Section 7602, which authorizes examination of books and witnesses pursuant to summons, one court noted, "That the co-existence of criminal and civil investigations does not vitiate a Section 7602 summons seems too well established to require more than reference to the authorities." *McGarrey* v. *Riley, supra* at 424. As the summons may be enforced under Section 7602(2) "notwithstanding the fact that the information might also be used in a criminal prosecution," *Wild* v. *United States, supra* at 209, so may the statutory authority of Section 7602(1) be used when the Government is interested in both civil and criminal tax conduct, so long as the statute is not used *solely for criminal purposes.* The record does not support the allegation that the tax statute in this case was used for investigation of purely criminal conduct.

Since defendants' books and records were examined under the authority of Section 7602 and not pursuant to a search warrant, the Court recognizes that the Government has the burden of establishing voluntary consent, "free from duress or coercion, an unequivocal, specific, and intelligently given consent." *United States* v. *Mackiewicz,*

274 F.Supp. 805, 808 (D.Conn. 1967). Since we find that the original purpose of the Government was to conduct a civil tax audit, that its investigation did not involve fraud or deception in the use of a civil tax statute, and that it made no misrepresentation of its purpose to defendants, we hold that the Government has met its burden of proving voluntary consent on the part of all defendants.

Our final point of inquiry concerns defendants' argument that there were forms of deception involved here more subtle than the fraudulent use of a civil tax statute, yet so unfair as to vitiate the consent given to examine books and records. The following authorities are cited in support of our finding that there was no deception of this kind.

When a taxpayer is not aware of his constitutional rights, his subjective lack of knowledge of such rights does not vitiate the voluntary surrender of his tax records to a revenue agent and does not violate his right to withhold his private records, so long as the agent made no misrepresentation as to his purpose in requesting the records. *United States* v. *Spomar*, 339 F.2d 941, 943 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965). There is no deception inherent in the agent's truthful description of his purpose as a "routine audit", *United States* v. *Sclafani*, 265 F.2d 408, 415 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959), nor does such a statement constitute a promise that only civil liability will be considered regardless of what the examination reveals. *Turner* v. *United States*, 222 F.2d 926, 932 (4th Cir.), *cert. denied*, 350 U.S. 831 (1955). Similarly, there is no fraud simply because the agent fails to advise the taxpayer that he is engaged in a "joint investigation" involving special agents and representatives of the Justice Department. *Badger Meter Manufacturing Company* v. *Brennan*, 216 F.Supp. 426, 431 (E.D. Wisc. 1962), *cert. denied*, 373 U.S. 902 (1963). Indeed, it has been held that the mere fact that the Intelligence Division was involved or "conducted a preliminary investigation undisclosed to the defendant does not constitute fraud or misrepresentation."

United States v. *Remolif*, 227 F.Supp. 420, 424 (D.Nev. 1964). Finally, it is clear that the Government is not guilty of fraud or deceit by failing to apprise the subject of the exact nature of the investigation or of any change in the character of the investigation. *United States* v. *Light*, 394 F.2d 908, 914 (2d Cir. 1968); *United States* v. *Neves*, 269 F.Supp. 158, 162 (S.D.N.Y. 1967).

In sum, we find that there was neither fraud or deceit in the use of a civil tax statute for investigation of purely criminal matters nor in any other manner connected with the nature or conduct of the investigation here involved. As a result, Defendants' motions for suppression of evidence on Fourth Amendment grounds must also be denied.

The suppression motions of Defendants Stamp and Dienelt, based on Fourth, Fifth and Sixth Amendment grounds, must also be denied. Since no records or books belonging to either of them were inspected by the Government, the only theory on which their motions could be granted is on the basis of tainted evidence, that is, that evidence of their involvement came to light only as the result of the allegedly illegal search or unconstitutional interrogation of Defendants Leigh, Rogers, Reynolds and Freeman. The suppression motions of these four defendants having been denied, the motions of Defendants Stamp and Dienelt must also be denied on the basis of the earlier portions of this opinion.

CONCLUSION

In summary, this Court holds (1) that suspects in criminal cases arising out of tax investigations are entitled to be advised of their constitutional rights when the accusatory stage is reached and the adversary process begins to operate; (2) that neither physical custody nor the entrance of the special agent into the case marks the clear line between the investigatory and the accusatory stages; (3) that the accusatory stage is reached in the tax case only when the underlying evils which *Miranda* sought to combat arise, that is, when the defendants become the prime suspects of

specific crimes, when they are subjected to the psychologically coercive atmosphere of government interrogation or demands for financial records, or when their freedom of action is significantly infringed; and (4) that, while the use of a civil tax statute for a purely criminal investigation would be unconstitutional, the use of such a statute to inspect books and records for both civil purposes and possible criminal prosecution does not constitute that fraud and deceit which characterize a search and seizure as unconstitutional.

As a result of these findings, Defendants' motions to suppress must be denied on Fourth, Fifth and Sixth Amendment grounds.

/s/ Aubrey E. Robinson, Jr.
Judge

September 5, 1968.

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2. District Court's Opinion Denying Defendants' Motion to Dismiss the Indictment.
May 2, 1969. [300 F. Supp. 503-07]

MEMORANDUM AND ORDER

Aubrey E. Robinson, Jr., District Judge.

This is a Motion to Dismiss the Indictment based on Rule 6(f) of the Federal Rules of Criminal Procedure and the Fifth Amendment. Defendants allege that the indictment procedure was defective in this case because the Grand Jury foreman did not read the indictment before signing it under the traditional certification "A True Bill." This allegation was raised in open court on April 28, 1969, at what was originally scheduled to be a "*Gaither* hearing."[1] But, subsequent to the scheduling of said hearing,

[1] Gaither v. United States, No. 21,780, 413 F.2d 1061 (D.C. Cir., April 8, 1969).

the Court of Appeals issued its supplemental *Gaither* opinion,[2] rendering the points raised in Defendants' written motion papers moot. However, counsel being present in Court to address themselves to other matters pending in this case, the Court agreed to hear argument and testimony regarding the alleged non-*Gaither*[3] defect in the indictment procedure.

Reviewing the lengthy history of this case, the Court concludes that defendants' April 28, 1969 Motion to Dismiss the Indictment was not timely under Rule 12 of the Federal Rules of Criminal Procedure and the local rules of this Court,[4] and that by virtue of the provisions of Rule 12(b) (2) of the Federal Rules of Criminal Procedure, defendants have waived their right to raise the allegation that the indictment is defective because the foreman failed to read it. Rule 12(b) (2) provides in pertinent part:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information * * * may be raised only by motion before trial. *The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof,* but the court for cause shown may grant relief from the waiver. [Emphasis added.]

Thus, if a motion is made which is addressed to defects in the indictment it must include *all* defenses and objections falling within this class then available to defendants.[5] Rule 12(b) (2) requires a *single* motion addressed

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[2] Gaither v. United States, No. 21,780, 413 F.2d 1081, On Petitions for Rehearing (D.C.Cir., filed April 24, 1969).

[3] Gaither v. United States, No. 21,780, 413 F.2d 1061 (D.C.Cir., April 8, 1969).

[4] District Court Rule 87(d).

[5] Fed.R.Crim.P. 12(b) (2). *See also* 1 C.A. Wright, Federal Practice and Procedure (Criminal) § 193 at 406 (1969).

to defects in the indictment; failure to raise all such defects in that one motion constitutes a waiver of the right to raise such objections.[6] "Although the court for cause shown may grant relief from a waiver, this is done only rarely."[7]

The indictment in this case was returned on September 22, 1967. Pleas of not guilty were entered on October 6, 1967. Subsequently, an extensive series of very thorough pre-trial motions were filed by counsel, which in the opinion of the Court left virtually no procedural avenue unexplored.[8] The Court more than once extended the time for filing these motions pursuant to Rule 12(b) (3) of the Federal Rules of Criminal Procedure. Finally, the motions were set for oral argument and the taking of testimony on June 4 and 5 and August 5, 1968. The motions were argued by five experienced retained trial attorneys and one experienced court-appointed attorney, and were ruled upon by the Court. One of the motions was captioned "Motion by Defendant, Walter R. Reynolds, to Dismiss Indictment for the Illegal Swearing of Grand Jury Witnesses to Secrecy," filed on November 29, 1967, subsequently joined in by *all* defendants, and argued and denied by the Court on August 5, 1968. Said motion was based on Rule 6(e) of the Federal Rules of Criminal Procedure and the Fifth Amendment, and clearly raised an objection "based on defects in the institution of the prosecution or in the indictment or information" within the meaning of Rule 12(b) (2). Defendants failed to allege in the August

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[6] Fed.R.Crim.P. 12(b) (2); Notes of Advisory Committee on Rules, Fed.R. Crim.P. 12(b), 18 U.S.C.A.

[7] 1 C.A. Wright, *supra* note 5 at 406.

[8] The pre-trial motions included motions to suppress based on the Fourth and Fifth Amendments, for discovery and inspection, for bill of particulars, to dismiss for want of speedy trial, to dismiss count one as duplicitous, to consolidate counts and dismiss, to sever defendants, to sever counts, to dismiss for illegal swearing of Grand Jurors, to inspect Grand Jury minutes, and to transfer trial of case.

5, 1968, motion to dismiss under Rule 6 [9] that the indictment procedure was defective because the Grand Jury foreman failed to read the indictment before signing. Instead, they seek to raise it by a second motion to dismiss under Rule 6 made one week prior to the scheduled commencement of the trial and some eighteen months after the indictment was returned. Under the express provisions of Rule 12(b)(2), they are precluded from raising this objection at this late time.[10] Their failure to raise it in their first motion to dismiss for defects in the indictment procedure constitutes a waiver for all time of their right to present that objection to the Court.[11]

"[T]he court for cause shown may grant relief from the waiver." [12] However, in the circumstances of this case the Court does not find cause for granting such relief and allowing defendants to belatedly raise their new objection to the indictment procedure. The information, both factual and legal, on which the April 28, 1969, motion was based was at all time available to defendants and yet they failed to take appropriate action at the time they filed their first motion to dismiss.[13] Looking to the facts first, there is no merit to the argument that defendants could not have discovered until recently the Grand Jury foreman's failure to sign the indictment. The foreman was available to be questioned by counsel long before the April 28, 1969, hearing; indeed, he was one of the prime witnesses at

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[9] Fed.R.Crim.P. 6.

[10] United States v. Campisi, 306 F.2d 308, 312 (2d Cir.), cert. denied, 371 U.S. 925, 83 S.Ct. 293, 9 L.Ed.2d 233 (1962).

[11] Fed.R.Crim.P. 12(b)(2). *See also* United States v. Campisi, 306 F.2d 308, 312 (2d Cir.), cert. denied, 371 U.S. 925, 83 S.Ct. 293, 9 L.Ed.2d 233 (1962); 1 C.A. Wright, *supra* note 5. *Cf.*, United States v. Freeling, 31 F.R.D. 540, 543 (S.D.N.Y. 1962).

[12] Fed.R.Crim.P. 12(b)(2).

[13] Scales v. United States, 260 F.2d 21, 46 (4th Cir. 1958), affirmed, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). *See also* 8 J.W. Moore, Federal Practice ¶ 12.03 [4] (Cipes ed. 1968).

the August 5, 1968 hearing on defendants' first motion to dismiss the indictment for defects in the Grand Jury proceedings. And if, as alleged, the supposed brevity of the Grand Jury deliberations on the day the indictment was returned led to the suspicion that the entire indictment could not have been read, this information was available on September 22, 1967, for counsel for defendant Reynolds has represented to the Court that he was outside the Grand Jury room during those allegedly abbreviated deliberations. Thus, the facts concerning the newly alleged defects in the Grand Jury proceedings were "notorious and available to [defendants] in the exercise of due diligence" long before April 28, 1969, one week prior to the scheduled commencement of trial.[14] Turning to the law, defendants' delay in raising the present objection is not justified by the fact that the *Gaither* decision[15] was not announced until April 8, 1969. Defendants have clearly indicated to the Court that their present objection is in no way based on *Gaither*,[16] as indeed it could not be under the rule of the supplemental opinion in that case,[17] nor on "new law" in any sense of the term, but on the more general and long-known mandates of Rule 6[18] and the Fifth Amendment. Thus, the applicable legal principles were equally "notorious and available" to defendants.[19]

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[14] Shotwell Mfg. Co. v. United States, 371 U.S. 341, 363, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963).

[15] Gaither v. United States, No. 21,780, 413 F.2d 1061 (D.C.Cir., April 8, 1969).

[16] *Id.* It should be pointed out that, unlike the present case, the contentions raised in *Gaither* had been raised by timely motion to dismiss the indictment in the District Court. *Id.*, 413 F.2d at 1065.

[17] Gaither v. United States, No. 21,780, 413 F.2d 1061, On Petitions for Rehearing (D.C.Cir., filed April 24, 1969).

[18] Fed.R.Crim.P. 6.

[19] Shotwell Mfg. Co. v. United States, 371 U.S. 341, 363, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963).

The Court need express no opinion on the substantive argument raised by defendants that the failure of the Grand Jury foreman to read the indictment before signing makes the indictment fatally defective. It is enough to say that the objection has been waived and that cause has not been shown for relief from that waiver.[20] Accordingly, it is this 2nd day of May, 1969,

Ordered that defendants' Motion to Dismiss the Indictment for Defects in the Grand Jury Proceeding be and is hereby denied.

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[20] To the extent that the contentions raised here have any relationship to the two *Gaither* opinions, the Court of Appeals in *Gaither* made it clear that the type of objection made there must be raised by timely motion under Rule 12(b) of the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 12(b). *See* Gaither v. United States, No. 21,780, 413 F.2d 1061 (D.C.Cir., April 8, 1969), at 1065 n. 2. Indeed, as noted *supra* note 16, the contentions made about the indictment procedure in *Gaither* had been raised by timely motion in the District Court. Finally, the Court indicated clearly that the timeliness requirements of both the federal and local rules should be applied in such a case, for in footnote 7 of its supplemental opinion, the Court said: "In our footnote 32 [of the original opinion], we stated: 'However, pretrial challenges to the defect found here can be made in cases now pending trial.' This merely tracked the language of Rule 12(b) (2), which we had cited in footnote 2, and did not foreclose application of Rule 12(b) (3) (or its local correlate, District Court Rule 87(d)), which we had cited immediately after Rule 12(b) (2) in footnote 2." Gaither v. United States, No. 21,780, 413 F.2d 1081, On Petitions for Rehearing (D.C.Cir., filed April 24, 1969), at n. 7.

3. District Court's Opinion Denying Defendants' Motions for Post-Trial Relief.

December 24, 1969.

AUBREY E. ROBINSON, JR., District Judge.

Five Defendants in this case were indicted in September, 1967, and charged with conspiracy to forge and utter and to commit false pretenses in violation of Title 18, Section 371, United States Code, and Title 22, Sections 1301 and 1401 of the District of Columbia Code.[1] In addition, the five were charged with twelve (12) counts of false pretenses in violation of Section 1301 of the District of Columbia Code. On May 20, 1969, a jury found each of the five defendants guilty of each of the counts of the indictment.

In a series of post-trial motions, the defendants seek relief in the form of a new trial, a judgment of acquittal or an order arresting judgment. Generally, the grounds advanced for the relief are alleged Gaither[2] irregularities in the grand jury indictment process, deficiencies in the pronouncement by the jury of its verdict, and inadequacies in the evidence required for conviction which was developed by the Government. Since the first two grounds for relief are, in the opinion of the Court, without merit and hence unable to support the relief which the defendants seek, we deal solely with the evidentiary problem. Because a review of the testimony offered in this case leads to the conclusion that any irregularities which might have occurred in the proceedings were not of sufficient import and magnitude to justify the exercise of the Court's discretion in ordering a new trial, the evidentiary issues which are raised are treated in the context of the Motion for a Judg-

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[1] A sixth defendant who was indicted for conspiracy to forge and utter and to commit false pretenses in violation of Title 18, Section 371 of the United States Code, and Title 22, Sections 1301 and 1401 of the District of Columbia Code was acquitted by the jury.

[2] Gaither v. United States, 413 F.2d 1061 (D.C.Cir. 1969).

ment of Acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. Under that Rule, a trial judge must ". . . determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty." *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947). See 8 *Moore's Federal Practice* ¶ 29.06 (2d ed. 1969). A. Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1153 (1960).

Walter Reynolds was president and owner of the Reynolds Construction Company. The Company was involved in real estate development in the northern Virginia area during the early 1960's. The project out of which this indictment arose was the Potomac Hills development in the vicinity of McLean, Virginia. This development consisted of several hundred homes in the forty to fifty thousand dollar price range. As a result of this project, the Defendant Reynolds was heavily in debt to the Eastern Savings and Loan Company (hereinafter referred to as "Eastern"), which had advanced him construction funds, to his subcontractors and to his real estate salesmen.

For various reasons, Reynolds experienced considerable difficulty in selling these homes; and in order to keep his operation solvent, he found it necessary to refinance. Reynolds' credit position, however, made refinancing through conventional techniques unfeasible. Since a substantial number of houses had been completed, Reynolds sought to use them as security for additional capital which otherwise would not be forthcoming. Reynolds initiated a scheme to obtain the necessary capital by representing to Eastern that private purchasers for seventeen (17) of the houses had been located. He was assisted in the execution of this scheme by Defendants Rogers and Leigh, two attorneys, who were primarily responsible for drafting the necessary legal documents, by Defendant Stamp, a mortgage broker, who made the refinancing contacts with Eastern, and by Defendant Freeman, who was an employee of Reynolds, and whose part in the scheme consisted of producing or inventing straw parties whom Reynolds would then offer to Eastern as purported purchasers for the seventeen properties.

As part of this plan, the defendants submitted to Eastern for each of the seventeen properties a set of documents consisting of a sales contract, a loan application, a credit statement, a settlement statement, a deed of trust, and an application for membership in Eastern. Following the submission of these applications, Eastern furnished approximately six hundred and seven thousand dollars ($607,000) in loan money. The defendants either obtained the signatures of actual straws on blank documents which were later filled in with false information or randomly selected the names of purported purchasers from the Harvard Alumni Directory. It is undisputed that none of the purported purchasers either authorized or consented to the contents of the loan application which was submitted in his name, that the documents submitted by the defendants were false, and that each of the defendants knew of the falsity of the documents.

The defendants were charged under Title 28, U.S.C. § 371 with conspiracy to violate §§ 1301 and 1401 of Title 22 of the District of Columbia Code, relating to forging and uttering and false pretenses, and with twelve substantive counts of false pretenses. Conviction for conspiracy to commit these substantive offenses requires the degree of criminal intent necessary for conviction of the substantive offenses themselves. *Ingram* v. *United States,* 360 U.S. 672, 678 (1959).

The offense of forgery under Title 22 § 1401 of the District of Columbia Code consists of the false making or material alteration, with specific intent to defraud, of any instrument in writing which if genuine might apparently be capable of effecting a fraud. *Milton* v. *United States,* 110 F.2d 556 (D.C. Cir. 1944), *United States* v. *Briggs,* 54 F. Supp. 731 (D.D.C. 1944). Uttering under the same section of the District of Columbia Code requires an alteration or falsification of a writing which is then passed or attempted to be passed to another while represented to be genuine, by one who knows that the writing was falsely made or altered and who entertains a specific intent to defraud. In addition, the writing must apparently be capable of effecting a fraud. *Karikas* v. *United States,* 296 F.2d 434 (D.C. Cir. 1961), *Easterday* v. *United States,* 292 F. 664 (D.C. Cir. 1923).

The elements of false pretenses are " . . . a false pretense or false representation by the defendant or someone acting for and instigated by him, knowledge by the defendant as to the falsity, reliance on the pretense or representation by the person defrauded, an intent to defraud and an actual finding." *Robinson* v. *United States,* 42 App. D.C. 186, 192 (1914), *Cuillo* v. *United States,* 325 F.2d 227 (D.C. Cir. 1963), 2 Wharton's Criminal Law 352."

One of the essentials of false pretenses is that the defrauded party have relied on the misrepresentations made to it in connection with the efforts to defraud. The de-

fendants vigorously contend that the Government failed to satisfy its burden of proof on this element.

The theory of the Government's case was that Eastern followed a general practice of relying on representations made in loan applications, and that from this general practice of reliance, a jury might infer that Eastern relied on the seventeen applications which the defendants submitted.

The Government was particular to restrict its direct examination of bank officials to the general practices which the bank followed after loan applications were received. The Government offered no evidence about the specific treatment of the seventeen applications in question. When the defendants attempted on cross-examination to enter this area, the Government successfully objected on the grounds that direct examination had been limited to Eastern's general practices. (Tr. 127-28.) Throughout the proceedings, the Government adhered to the position that, on the strength of evidence about the general practice of Eastern to require, accept and process loan applications, a jury would be fully justified in inferring that the applications which the defendants submitted were in fact relied on by Eastern as the basis for making loans.

The Government's evidence of reliance came primarily from two of Eastern's key officials: Thomas R. Harrison, the president, and Robert L. Stoy, the assistant secretary.

Harrison's direct testimony outlined the procedures which Eastern followed after loan applications were received, and the part which applications played in those procedures. His testimony was that after a loan application was received the information which had been submitted with the loan request was forwarded to an appraiser who would determine whether the value of the property justified making a loan in the amount of the request. If the appraiser determined that the valuation of the property justified the loan, his recommendation was forwarded to Eastern's loan committee which usually consisted of

two or three senior officers who would then recommend a loan to the executive committee. The executive committee would then approve the loan subject to the final approval of the Board of Directors. (Tr. 532-33.) He also testified that it was not generally Eastern's policy to verify the information which an application contained but that the application was filed in order that it might be referred to at some point during the period when a filed application was pending to determine whether any changes in an applicant's credit picture had occurred after submission and prior to the final decision on whether to grant the loan. (Tr. 558.)

Harrison testified that while it was not Eastern's policy to uniformly verify information in loan applications, verification was sometimes made. Whether or not the information was verified, he testified, depended on the extent of Eastern's prior contact with the agent who forwarded the applications. The general policy was not to verify the information on applications received from agents with whom Eastern had had prior dealings. (Tr. 553-54.)

Defendant Stamp, the mortgage broker who forwarded the applications which became the subjects of this indictment, was known to Eastern officials and had dealings with Eastern on several prior occasions. (Tr. 561.)

Finally, Harrison testified that had it been known that information and representations made on a loan application were false, the application would not have been considered and a loan would not have been made.

Robert L. Stoy, the assistant secretary and settlement officer of Eastern, offered essentially the same testimony as to the general practices which Eastern followed in evaluating loan applications. He testified that when applications were received they were submitted to independent appraisers who would examine the applications, appraise the property and then make recommendations to the bank's loan committee. (Tr. 120.)

The defendants offered evidence purporting to show that Eastern did not rely on the representations in the applications because the identities of the borrowers had no bearing on Eastern's decision to grant loans, but that loans were made solely on the basis of the assessed valuation of the property offered as security. They also sought to show that Eastern customarily charged builders a higher interest rate on construction loans than it charged purchasers on home loans. (Tr. 555.) As part of the terms of the transactions here, the interest rate which Eastern charged for the original construction loans was six percent (6%). Under the terms of the refinancing, the interest rate required of the straws was also six percent. The defendants contended that Eastern's failure to adjust the interest rate in accordance with its usual practice showed that not only did Eastern not rely on the representations made by the defendants, but that it knew all along that Reynolds and his associates and not the straws were the real parties in interest. The defendants offered as additional evidence of non-reliance Eastern's downward adjustment of the interest rate when refinanced property passed from the hands of the straws into the hands of bona-fide consumer purchasers.

When this evidence was submitted to the jury, it could conceivably have been unimpressed with the Government's evidence of reliance and concluded that, consistent with the defendants' explanation of the events, Eastern did not rely on the representations in the applications. But at this juncture, we must conclude that the jury resolved conflicts in the evidence in the Government's favor and, in accordance with Rule 29(c), limit our inquiry to whether or not there was evidence which afforded a rational footing for the verdict which the jury did render. *See Johnson* v. *United States*, 21,851 D.C. Cir. June 20, 1969; slip op. at 4.

The Government's evidence might well have satisfied a jury beyond a reasonable doubt that Eastern relied on the

false information in the applications. The Government's testimony afforded a basis for a conclusion that Eastern followed a general practice of reliance on the contents of loan applications. From this conclusion, a jury could have inferred that Eastern relied on the seventeen applications which the defendants submitted. The probative value of the testimony about Eastern's general practice was not vitiated by the Government's failure to prove the processing of the specific applications in question, particularly in light of Harrison's testimony that the applications would not have been accepted and loans would not have been made had Eastern known the applications were forged, and that verification of the contents tended not to be made when applications were received from agents such as Stamp with whom Eastern had had prior dealings. Moreover, a jury could well have concluded that because of the nature of the financial situation from which the defendants were seeking relief and because they prepared and submitted forged documents, that they acted with the specific intent to defraud necessary for conviction under the substantive false pretense counts as well as under the conspiracy count.

The character of the reliance necessary for conviction of false pretenses was outlined in *Partridge* v. *United States*, 39 App. D.C. 571, 581 (1913), where the Court said that ". . . it is not necessary to a conviction that the false pretenses alleged would have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party. And this is true even though the prosecutor [complainant] would not have surrendered the goods solely on the pretense alleged. To require that the belief should be the exclusive motive would exclude conviction in any case; for in no case is any motive exclusive."

In *Gilmore* v. *United States*, 273 F.2d 79, 82 (D.C. Cir. 1959), our Court of Appeals restated the *Partridge* "pre-

ponderating influence" test of reliance under § 1301. It said: "The law merely demands that this belief be a contributing influence sufficient to turn the scale, or to put it another way, that the alleged fraud would not have been accomplished but for the misrepresentations made." (Id. at 82.) *See Ciullo* v. *United States,* 325 F.2d 227, 229 (D.C. Cir. 1963). Under the *Partridge* test, the misrepresentation necessary for the conviction need not have been the only inducement for the defrauded party to act: it need only have been one factor.

Viewed in the posture of a Rule 29(c) motion, the evidence of reliance which the Government produced conformed to the *Partridge* and *Gilmore* standards. A jury could rationally have concluded that applications were a significant and integral part of the loan granting process and that Eastern was not in the habit of lending large sums of money without regard to the identity or to the personal credit history of loan applicants. The jury could have reached the conclusion that Eastern relied on the representations in the applications and at the same time believed the defendants' testimony that the assessed valuation of the property was of paramount concern to Eastern, because it was Eastern's principal recourse in case of default. Such conclusions would be consistent with evidence which the Government offered from which the jury could have inferred that while the assessed valuation of the security determined the amount of the loan, the representations in the applications played a different but nevertheless crucial function, namely, that of determining to whom the money would be loaned.

Accordingly, it is by the Court this 24th day of December, 1969,

ORDERED, that defendants' Motions in Arrest of Judgment, Motions for a New Trial, and Motions for a Judgment of Acquittal be and hereby are denied.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,193

UNITED STATES OF AMERICA

v.

R. MARBURY STAMP, APPELLANT

No. 24,194

UNITED STATES OF AMERICA

v.

HARLAN E. FREEMAN, APPELLANT

No. 24,197

UNITED STATES OF AMERICA

v.

E. NEIL ROGERS, APPELLANT

No. 24,198

UNITED STATES OF AMERICA

v.

WALTER R. REYNOLDS, APPELLANT

Appeals from the United States District Court
for the District of Columbia

Judgment entered this date ←

Decided December 20, 1971

Mr. Stanley M. Dietz for appellant in No. 24,193.

Mr. Lester M. Bridgeman (appointed by this court) for appellant in No. 24,194.

Mr. Farley M. Warner (appointed by this court) for appellant in No. 24,197.

Mr. J. Alan Galbraith, with whom *Messrs. Vincent J. Fuller* and *Robert L. Weinberg* were on the brief, for appellant in No. 24,198.

Mr. Paul J. Schaeffer, Attorney, Department of Justice, of the bar of the Supreme Court of Oregon, *pro hac vice*, by special leave of Court, with whom *Mr. William S. Lynch*, Attorney, Department of Justice, was on the brief, for appellee.

Messrs. Thomas A. Flannery, United States Attorney, and *John A. Terry*, Assistant United States Attorney, also entered appearances for appellee in Nos. 24,193, 24,194 and 24,198.

Before BAZELON, *Chief Judge*, and TAMM and ROBB, *Circuit Judges*.

Opinion for the Court filed by TAMM, *Circuit Judge*.

Concurring opinion filed by BAZELON, *Chief Judge*, at page 42.

TAMM, *Circuit Judge:* In this case the six defendants, Walter R. Reynolds, Bertram G. Dienelt, Jr., Harlan E. Freeman, R. Marbury Stamp, A. Claiborne Leigh and E. Neil Rogers, were tried by a jury on a 13-count indictment in the United States District Court for the District of Columbia. With the single exception of Dienelt they were all found guilty on each of the 13 counts of the indictment. The first count charged that, in violation of 18 U.S.C. §371 (1964), the appellants and two other defendants [1] conspired to violate D.C. Code §22-1301 (1967) (false pretenses) and D.C. Code §22-1401 (1967) (forgery) in connection with the refinancing of loans that had been extended by Eastern Savings and Loan Association of Washington, D.C. (hereinafter either

[1] Dienelt was found not guilty and hence was without reason to join in this appeal. Defendant Leigh chose to file no appeal.

"Eastern" or "the Association"), on 17 parcels of land. Counts 2-13 of the indictment charged each of the defendants, with the exception of Dienelt, with substantive violations of D.C. Code §22-1301 (1967) in the refinancing of 12 separate parcels. The appellants have raised a number of claims of error, either individually or which have been joined in by other appellants. While we do not find it necessary to discuss each of the claims raised by the appellants, we have given each of them careful consideration. Nonetheless, this court is compelled because of the reasons outlined below to affirm each of the convictions of the District Court.

I. Statement of Facts

The issues in this case are highly complicated and therefore an in-depth analysis of the events leading up to the indictment will be required in order to understand the contentions of the appellants and those of the Government.

Sometime prior to 1963 a special project was formed by the Internal Revenue Service for the purpose of investigating corruption among certain public officials in Fairfax County, Virginia. The project was formed jointly by the United States Department of Justice and the Internal Revenue Service, and was staffed by Revenue and Special Agents of the Internal Revenue Service.[2] Legal assistance to this group, known as "Metro" Project, was provided by the Organized Crime and Racketeering Section of the Department of Justice.

The purpose of this investigation was explained by Edward Joyce, an attorney with the Organized Crime and

[2] The distinction between Revenue Agents and Special Agents should be noted. The Revenue Agent performs *civil* tax audits while the Special Agent is involved in investigations which are *criminal* in nature from their inception. From time to time criminal matters will be uncovered by Revenue Agents in the course of a civil tax audit; when this occurs such matters are brought to the attention of a Special Agent.

Racketeering Section of the Criminal Division, Department of Justice, who served as legal advisor to the project. Joyce stated that

> [T]he investigation was an income tax investigation into various activities in Fairfax County, that is, to ascertain whether the people who were accepting bribes were paying income taxes on the bribes accepted and whether the people who were paying the bribes were properly charging them or not charging, rather, as an expense, and the gambling was conducted under Wager Tax Stamp Act. [*Sic.*]

(J.A. 53.)

> The central purpose of the organization was to look at the income tax investigations of the people in Fairfax County. The decision to proceed on Section 1952 was not made until there was an assessment of all of the evidence obtained.[3]

(J.A. 56.)

A full description of "Metro's" *modus operandi* was given by Special Agent Kenneth E. McElroy, who at the time of the investigation was assigned to the Internal Revenue Service's Intelligence Division in Richmond, Virginia:

> The practice was that a revenue agent was assigned in a case to make an audit, and at the completion of his audit or at the time that he figured he had gone far enough, if he found what were indications of fraud—and we say indications of fraud is all he is required to find—upon finding this, he writes what is known as a Referral Report. This Referral Report is sent to the Chief of the Intelligence Division in Richmond, Virginia, and he has to make the decision as to whether there will be what is spoken of as a joint investigation. And if so, then a special agent is assigned, and the special agent assigned and the revenue agent, in most cases the same revenue agent, continues on with the investigation.

(J.A. 48.)

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[3] The Section 1952 procedure is explained at pp. 31–33, *infra*.

"Metro" Project was placed under the supervision of Oral Cole, who was named project director. One of the prime targets of their investigation was A. Claiborne Leigh, who was, at the time, chairman of the Fairfax County Board of Supervisors. In June 1963 Cole, acting on a tip received from an informer, instructed Revenue Agent Hansell to audit Leigh's income tax returns for the year 1960. Leigh gave Hansell permission to inspect his records and to copy certain cancelled checks, bank statements and deposits. At this time Hansell did not make Leigh aware of his concern with potential criminal activity on Leigh's part. However, on January 20, 1964, Hansell returned to Leigh's office with Special Agent Kenneth E. McElroy, at which time Leigh was notified that he was under suspicion for criminal tax evasion and he was then given the required warnings with regard to his constitutional rights.

Prior to June 1963 Leigh was engaged in the practice of law with appellant Rogers. When Hansell visited Leigh's office he learned that some of the records of this partnership were in Rogers' possession. Interested in examining these records, Special Agent McElroy visited appellant Rogers in February 1964 and told him that he desired to examine certain records of the Leigh-Rogers partnership in connection with a criminal investigation of Leigh in which he was then engaged. McElroy assured Rogers that he was not under investigation, and after these assurances McElroy received several documents in the form of settlement files from Rogers. Several months later, in October and November 1964, McElroy again interviewed Rogers; this time with reference to the "straw" transactions which are at issue in this case. Finally, in April 1965, Rogers himself was subjected to an audit by a revenue agent. At no time was Rogers told that he was a criminal suspect nor was he advised of his constitutional rights.[4]

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[4] If Hansell suspected that Rogers was criminally involved with Leigh, it stands to reason that a Special Agent would

In another aspect of the "Metro" Project operation, Director Cole instructed Michael J. Evangelist, a revenue agent, to audit certain tax returns of the Reynolds' Construction Company, of which appellant Reynolds was the president. In addition, Agent Evangelist was assigned to audit personal returns of both Reynolds and his wife. During the course of these audits, Evangelist was "to obtain all the financial transactions between Reynolds and Leigh." (J.A. 41.) McElroy made this request based on his suspicion that Reynolds had bribed Leigh. In March 1964 Evangelist visited the company's offices and was given permission to inspect all corporate records by George R. Steele, secretary-treasurer of the company and an accountant. Evangelist did not tell Steele of the criminal aspect of his investigation.

To fully understand the facts in this complicated case, it will be helpful to explain the Government's theory of the litigation. Reynolds Construction Company had borrowed heavily from Eastern over the years in order to finance a housing project in McLean, Virginia. Soon after this project was completed Reynolds desired additional loans from Eastern. Reynolds understood from Eastern, however, that additional loans could not be granted until the company could sell a number of the homes which were encumbered by the construction loans. Reynolds, unsuccessful in his efforts to sell the homes to legitimate purchasers, devised a scheme to sell these homes to "straw" purchasers, who would in turn borrow money from Eastern under the guise of loans enabling purchase of the improved lots from Reynolds. This would, therefore, change the nature of the loan from one

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have been ordered to review his tax returns rather than a Revenue Agent. It is apparent to the court therefore, that at least at the time Rogers was subjected to a tax audit he was not suspected of any criminal activities by "Metro." Therefore, the fact that Rogers was never told he was a suspect or given his rights has no particular significance since he was not apparently under suspicion.

issued to Reynolds for construction purposes to one issued to the ultimate purchaser as a mortgage-type transaction. The money realized from the loans to "straw" purchasers would be used to liquidate the construction loans with the balance finding its way to Reynolds, who by this time would arrange for a re-transfer of the property from the "straw" puchaser. According to the Government, Reynolds was aided in his ruse by the other three appellants and the two defendants not involved in this appeal.

Appellant Stamp, a mortgage broker, was responsible for submitting various loan applications to Eastern; none of the "straws" made personal application to the bank for any of the loans. Appellant Freeman, secretary of Reynolds Construction, and defendant Dienelt, Reynolds' outside accountant, were instructed by Reynolds to obtain the "straw" purchasers. Only being able to find five willing parties between them, Freeman resorted to picking 12 names at random from the 1960 Harvard Alumni Directory. These 12 parties had no knowledge of their selection and were never informed of their being listed as purchasers in any of the documents for the loans. Freeman also fabricated false credit statements for these 12 parties. Even the credit information supplied for the five bona-fide "straw" parties contained statements which grossly overstated the "straws' " true assets.

Eastern would only disburse loans in accordance with their established settlement procedures. These procedures called for the completion and execution of seven documents, *i.e.*, a sales contract, a formal loan application, the lender's credit statement, a settlement statement, a deed of trust, a deed of trust note and an application for membership in Eastern Building and Loan Association (also known as a signature card). Under their established policy Eastern would perfect a loan by giving the loan application to an appraiser for approval, upon receiving the appraiser's report the application would be referred to the loan committee, which was composed of two or three senior Association officers, who

would in turn make recommendations to the executive committee. It was the executive committee, *i.e.*, the president and four members of the board of directors, who actually passed on loan applications and committed funds. Once this decision has been made the loan applicant is informed of Eastern's decision. The applicant is then responsible for having a title search performed and obtaining a title binder [6] which is then returned to Eastern. The title binder is sent to Eastern by the settlement attorney. The Association then would set a date for settlement and begin preparation of certain of the documents which we enumerated above, *i.e.*, deed of trust, deed of trust note and the signature card, as well as, at the time of the instant transactions, a passbook with a payment notice thereon. All of these matters were handled by the settlement attorney who received the forms from Eastern and was instructed to give them to his clients at the time of settlement. During the meeting in the settling attorney's office the settlement sheet which contains all the information concerning the loan disbursement, the sales price and all other figures involved in the transaction is reviewed and a copy returned to the Association. Receipt of the settlement sheet along with the executed note and other papers completes the process and Eastern would then disburse the money. (J.A. 82–85, direct examination by the Government of Mr. Robert L. Stoy, who was assistant treasurer of Eastern when the loans in question were issued.) Defendant Leigh and appellant Rogers, who were partners, were brought into the scheme when they undertook to act as settlement attorneys.

According to the Government's theory Eastern believed the contents of the various documents presented to it to be accurate and truthful, and in fact, on their face, the documents appeared not to be "straw" transactions but actual

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[6] A title binder indicates the current owner of the property, the future owner, and the maker of the trust. (J.A. 83.)

purchases, wherefore in 1962 and 1963 Eastern approved loans totaling $607,000 and sent the necessary papers to complete the transactions to Leigh and Rogers as settlement attorneys as was their practice. Each of the appellants received a fee for his role in the overall plan. While none of the purported purchasers received any of the loan proceeds, the five bona-fide "straw" purchasers were given a fee of $200 for agreeing to act in that capacity.

On the basis of information obtained in these early Metro investigations, Revenue Agent Evangelist was instructed to interview appellant Freeman on five or six occasions in the spring and summer of 1964. At some point during these interviews Freeman indicated to Evangelist that he had indeed forged the name of the borrower on 12 of the 17 "straw" transactions and that he had been paid a $200 fee for each such transaction. The record, however, is not clear as to whether Evangelist was cognizant of the Freeman forgeries when they initially met. Once again, there was no mention of the criminal aspect of the investigation made to the appellant.

September 1965 found the members of the "Metro" Project sending letters of inquiry to persons whose names appeared on the records involving the transactions investigated. In December of the same year project members received responses indicating that the "borrowers" had not participated in the transactions under investigation and that they were without knowledge as to what had transpired. When they were next contacted by agents assigned to the Project both Rogers and Freeman were notified of their constitutional rights and informed of their status as criminal suspects. Reynolds was not subsequently contacted and hence was never apprised of his rights.

II. The Indictment

A number of appellants urge us to find the grand jury's indictment faulty since no member of that body read the document in its entirety. The evidence seems to support their

contention concerning the reading of the indictment but thorough consideration of all of the surrounding circumstances leads us to believe that this flaw was by no means crucial and certainly was not prejudicial to them.

Prior to the trial of this action in the District Court the appellants moved to dismiss the indictment on the grounds that witnesses called before the grand jury were forced to take an oath of secrecy prior to their giving testimony in violation of Rule 6(e), FED.R.CRIM.P. The motion was argued and denied; the appellants have not attacked this ruling on appeal. When the appellants brought a motion to dismiss the indictment, alleging failure of any member of the grand jury to read the indictment, the trial judge ruled the motion to be untimely and, further, he deemed this contention to be waived due to the defendants' failure to bring the matter to the court's attention at the time the earlier motion was made. The trial judge ruled that failure to bring both motions contemporaneously with regard to the indictment constituted a waiver under Rule 12(b)(2), FED.R.CRIM.P.* The appellants contend that this matter goes to the jurisdiction

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* RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

. . .

(b) The Motion Raising Defenses and Objections.

. . .

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

of the court and can be raised at any time during the pendency of the proceeding. *Id.*

The indictment in this case was 21 pages long and contained 13 separate counts. The first count is nine pages long and charges conspiracy, while each remaining count concerns a single loan transaction and is one page in length. Counts 3 through 13 are identical to Count 2 except that each involves a different date and different loan amount. A hearing was held on April 28, 1969 to consider the merits of appellants' challenge to the indictment. Mr. Evan L. Swain, the foreman of the grand jury, was called upon to testify and stated in open court that on the date the indictment was returned the Government attorney read the first count to the grand jury in its entirety, as did he the second count, and that he then proceeded to summarize the remaining counts to the grand jury explaining that the language in each of these counts was the same as that in count 2 and that the only difference in each of these counts was the date and the amount of the given loan in question. The Government attorney then left the indictment, which he had previously prepared, with the grand jury giving them the opportunity to deliberate and determine whether or not to return an indictment. The grand jury deliberated and chose to return the indictment, at which time the foreman affixed his signature to the indictment; it was returned in open court at 10:15 a.m.

Finding that the grand jury was no longer in session when he arrived at 10:18 a.m., attorney for appellant Reynolds brought a motion to dismiss the indictment since he deemed it impossible for the grand jury to meet at 10:00 a.m., the time he believed that the grand jury was scheduled to convene, consider the evidence, read the indictment and pertinent statutes, determine whether or not to indict and return the indictment enabling them to adjourn by 10:18 a.m. The record contains substantial controversy concerning the actual time the grand jury did convene and the Government offered

to prove that the actual time of convening was 9:15 a.m. rather than 10:00 as alleged by Reynolds' attorney. The court, however, never called upon the Government to offer its proof.

At the pre-trial hearing held on May 5, 1969, the Government attorney testified as follows:

> [T]he Government *read through at the grand jury session* prior to the return of the indictment *the entire Counts 1 and 2.* As was said by Mr. Molenof [co-counsel for the Government] and as testified to by the grand jury foreman, Mr. Swain, *the remaining counts were reviewed thoroughly in detail count by count.*
>
> Now, the second count is basically the same as the remaining counts with different names. There was relation to that and independent review of each count, so *the indictment in its entirety was thoroughly reviewed to the grand jury.* (Emphasis added)

(J.A. 73). After considering the language of Rule 12, FED.R.CRIM.P., the trial judge ruled on the motion. We set out his comments in the margin.[7]

The purpose of the indictment was definitively described by the Supreme Court almost a hundred years ago. *Ex Parte Bain,* 121 U.S. 1 (1887). In that case the Court stated:

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[7] [I]nsofar as Rule 12 is concerned, it has been consistently construed that failure to bring all of the matters with respect to *procedural defects* in the grand jury to the attention of the Court at the time any motion is made with respect to the grand jury proceeding, including all of those matters which either *were in fact known or could have been with due diligence discovered,* effect a waiver. And in this situation it was the judgment of the Court, as announced in the opinion, that to bring this motion under these conditions and with these facts before the Court at the time it was brought, did not justify setting aside any waiver. In fact, a waiver had been in effect since the original motion for dismissal of the grand jury was argued by counsel and joined in by all other counsel, *almost a year ago.* (Emphasis added).

(J.A. 76–77.)

> We are thus not left to the requirements of the common law, in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that 'no person shall be held to answer' for such a crime, 'unless on a presentment or indictment of a grand jury.'

Id. at 6. The Court went on to state that any amendment to the indictment by the trial judge in the form of an addition or deletion in material language of the document would be violative of the intention of the framers. The indictment must be found by the grand jury and cannot be interfered with by the judge. *Ex parte Bain, supra,* 121 U.S. at 8; *see Russell v. United States,* 369 U.S. 749, 792–93 (1962) (Harlan J., dissenting); *Stirone v. United States,* 361 U.S. 212, 217 (1960); *United States v. Norris,* 281 U.S. 619, 622 (1930); *Carney v. United States,* 163 F.2d 784, 788 (9th Cir. 1947). Although *Bain* was handed down in 1886 it has continually been followed and cited with approval. In a case where the error is merely a minor procedural matter the court's jurisdiction will not be disturbed. *See Frisbie v. United States,* 157 U.S. 160 (1895).

The leading case in our jurisdiction with regard to the validity of grand jury procedures, as well as the indictment, is *Gaither v. United States,* 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969). In *Gaither* the court held that under the requirements of Rule 6, FED.R.CRIM.P., the actual terms of the indictment must be passed on by the grand jury. 134 U.S. App. D.C. at 164, 413 F.2d at 1071. We applied the teachings in *Bain* concerning amendments by judge or prosecutor after issuance of the indictment by the grand jury and established a set of guidelines for indictment procedures after our decision in *Gaither.* It should be noted that for the sake of efficient administration of criminal justice we determined that our decision in *Gaither* should be applied prospectively and not retroactively. 134 U.S. App. D.C. at 166, 177-78, 413 F.2d at 1073, 1084-85. We need not concern ourselves, however,

with the requirements established by *Gaither* since the indictment in the case at bar was issued before our *Gaither* decision.

In the subsequent cases handed down by this court we have reaffirmed our holding in *Gaither*. In *United States v. Wilson*, 140 U.S. App. D.C. 220, 434 F.2d 494 (1970) we deemed it proper to apply *Gaither* prospectively since the defects it sought to correct were procedural in nature rather than substantive. In *United States v. Green*, 139 U.S. App. D.C. 75, 77 n.2, 429 F.2d 754, 756 n.2 (1970), we held that even if the procedures followed in the indictment issuance were erroneous we would not have to question the validity of the indictment as long as the rights of the appellant do not appear to have been substantially prejudiced.

While the appellants contend that the reading of the indictment by the Government attorney and not by any member of the grand jury is a far greater abuse than that in *Gaither* we find it impossible to concur with their reasoning. This matter was before the grand jury on four occasions prior to the voting on the indictment.[*] The grand jury had ample time in the months this matter was under their consideration to weigh the evidence and the testimony. Once the Government attorney read counts 1 and 2 and explained counts 3 through 13 to the grand jurors they were free to return an indictment or not as their judgment dictated. The mere fact that the foreman, or any other member of the grand jury, failed to physically read the indictment prepared *after* it

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[*] Mr. Swain testified as follows:

Q. [T]he document in the file of this case indicates that on April 28, May 5, May 12, June 23 and September 22, 1967, the grand jury met on this case. Does that conform roughly to your recollection?

A. Right. The dates may not be—I can't recall the dates but that sounds about the right time.

(J.A. 64.)

had been read to them can in no way, according to our thinking, be found to be prejudicial to appellants herein. We find the motion to be without merit in light of the established decisional law in this Circuit.

III. Delay in Issuance of the Indictment

Appellants claim that the amount of time which elapsed between the dates of the offenses charged and the issuance of the indictment was prejudicial. In his findings the trial judge stated that there was neither unnecessary delay nor substantial prejudice. It is clear to this court that the findings of the trial judge are amply supported by the record.

As we have expressed earlier, this case is a highly complex one. There were six defendants at the trial level in an action involvng 17 separate transactions transpiring over a period of 16 months. A case of this magnitude by its very nature requires sufficient time to investigate and examine prior to the seeking of an indictment. The record discloses that "Metro" Project was formed early in 1963, however, it was not until December 1965 that the investigators first became aware of the actual events regarding the "straw" transactions. At that time investigators first learned that the names appearing on the loan applications filed by appellants were used without the knowledge or permission of the "purported" loan applicants. "Metro" Project investigators finished interviewing putative borrowers and receiving affidavits from these unsuspecting parties in March 1966. By the time the evaluation of all the material received had been completed it was no longer possible to go before the grand jury then in session. All of its time had been allocated to other matters. When the new grand jury convened in March 1967 the Government brought this case before the grand jurors within a month. The facts support the Government's contention that "[t]here was no plan to delay in bringing it before the grand jury and there was no unnecessary delay in seeking the indictment." Brief for the Government at 25.

When there is a showing of substantial delay in a case the Government must show that such delay did not act to substantially prejudice the defendants. A delay is deemed substantial when its length is of greater duration than usually attributable to the normal processes of the judicial system. *Williams v. United States*, 102 U.S. App. D.C. 51, 250 F.2d 19 (1957), wherein we quote from the Supreme Court decision in *Beavers v. Haubert*, 198 U.S. 77, 87 (1905):

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.

Williams involved a 7-year delay in prosecution, during which time appellant was adjudicated incompetent and was committed to St. Elizabeth's Hospital for mental treatment. In establ|ing guidelines for trying an appellant seven years after the crime, the court stated:

> [T]he government must show two things, in [our] view: (1) that there was no more delay than is reasonably attributable to the ordinary processes of justice, and (2) that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay.

Williams v. United States, supra, 120 U.S. App. D.C. at 53, 250 F.2d at 21.

While the appellants herein base their appeal on the delay between the offenses charged and the issuance of the indictment rather than on a denial of a speedy trial the considerations which this court must make are essentially the same. As the District Court said in *United States v. Parrott*, 248 F.Supp. 196, 202 (D. D.C. 1965):

> There are four factors in a speedy trial consideration which appear to be crucial: (1) time involved; (2) who caused the delay; (3) the purposeful aspect of the delay; and (4) prejudice to the defendant.

The Sixth Amendment right to swift justice is not confined to trial. "[T]he constitutional guarantee protects against undue

delays in presenting a formal charge as well as delays between indictment and trial." *Mann v. United States,* 113 U.S. App. D.C. 27, 29 n.4, 304 F.2d 394, 396 n.4 (1962).

In *Parrott* the court expressed the belief that "logically . . . the computation [of occurrence to trial] should begin with the date on which the Government considered the defendants' action to be 'criminal'." *Parrott v. United States, supra,* 248 F.Supp. at 202. *Hanrahan v. United States,* 121 U.S. App. D.C. 134, 348 F.2d 363 (1965) involved a conviction in a highly-complex case four years after the issuance of the indictment.

> Rule 48(b), FED.R.CRIM.P., if not the Sixth Amendment, in terms requires the prosecutor to proceed without "unnecessary delay." The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun. * * * [T]he critical question in this case is, not when was the indictment filed, but when was the prosecution commenced. (Citations and footnotes omitted.)

121 U.S. App. D.C. at 137, 348 F.2d at 366. While the record indicates that Revenue Agent Evangelist learned about the forgeries from Freeman at a relatively early date, it is not clear that these matters were immediately brought to the attention of his superiors. The judge in the District Court held that his superiors did not learn of the forgeries until later and we have no reason to upset his determination. In addition, where a case is as complex as the matter before us, the Government will be allowed more time in bringing an indictment than in a case which contains only simple issues. *United States v. Orsinger,* 138 U.S. App. D.C. 403, 428 F.2d 1105 (1970) *cert. denied,* 400 U.S. 831 (1970); *Nickens v. United States,* 116 U.S. App. D.C. 338, 323 F.2d 808 (1963).

We find no prejudice by the time lapse in this case. Appellant Stamp does claim to have destroyed some files which would have been the basis of his defense prior to the bringing of the indictment but it is unclear to us as to what aid

those files would have been to him and he makes no assertion as to their content or the exonerating effect they would have had with respect to his defense.

IV. Eastern's Reliance on Appellant's Representations

The appellants contend that the Government has failed to adequately show the presence of all elements necessary for a conviction of obtaining something of value by false pretenses. *See Ciullo v. United States,* 117 U.S. App. D.C. 31, 325 F.2d 227 (1963). The appellants would concede, as indeed they must, that the Government introduced sufficient evidence related to the proving of some of the necessary elements. It was certainly proven that *known false representations* were made and that *something of value was received.* The appellants, however, strongly argue that the Government failed to show one of the other necessary elements to this crime, *i.e., reliance* by Eastern upon the truthfulness of the documents submitted to them. It is appellants' contention that Eastern actually suggested the scheme involved, since it was willing to make loans to Reynolds Construction Company, but only after "Mr. Reynolds got some 15 or 20 houses out of the name of Reynolds Construction Corporation." (Trial tr. 682.) It is appellants' claim then that "with the knowledge and with the concurrence of Eastern Savings and Loan, [they] were to straw these houses out." (Trial tr. 684.) If this were true, then the necessary fraudulent intent would indeed be lacking.

As its first witness on the reliance issue the Government called to the stand Robert L. Stoy, who at the time of the trial was assistant secretary at Eastern, and at the time of the loans was assistant treasurer. Mr. Stoy on direct examination testified as to the general practice of Eastern concerning the procedure followed in 1962 and 1963 after an application for a loan was filed and after favorable consideration (Trial tr. 120). On cross-examination he testified that Eastern's policy with respect to loans to the Reynolds

Construction Company was no different than that with any other borrower. (Trial tr. 144.) Though Stoy protested he was not on the loan committee and that he could not testify as to the exact basis for the granting of loans, he did venture to say that loans were based solely on the appraised value of the property. (Trial tr. 133–134.) He did say, however, that credit information was required to be given in the application for a loan and that he did approve the credit of the straw purchasers involved although he did not check the information. (Trial tr. 131, 132.) On re-direct examination Stoy explicitly stated that *no loan application would be considered initially if it was found to be predicated on a false sale or information contained therein.* (Trial tr. 146.) He also testified immediately thereafter that Eastern at this time, in making permanent loans after construction loans, had no personal contact with the borrowers and acted solely on the papers submitted to it. *Id.* On re-cross-examination Stoy stated that he never knew of Eastern's permitting property, on which it had a loan to stand in the name of someone other than the real party in interest. (Trial tr. 147.) The Government also called Thomas R. Harrison, who at the time of the trial was president of Eastern and at the time of the loan was executive vice-president, and as such was responsible for the loan department. (Trial tr. 541.) Mr. Harrison also testified that Eastern would not consider making any loans based on a false sale of property or on false information. Harrison further testified on cross-examination that in making a loan, though Eastern primarily looked to the appraised value of the real estate involved, it did require a credit report which was kept on file as a matter of information even though it was never verified. (Trial tr. 558, 559.) Harrison did, however, testify earlier on cross-examination that Eastern would possibly make more of an effort to assure that a loan application was not based on false information (presumably information other than that contained in

the credit report), when the application was submitted by an agent it did not know.[9] (Trial tr. 534.)

An analysis of the above-mentioned testimony indicates there was sufficient evidence for the jury to infer that Eastern relied on the veracity of the documents presented to it in this case. Stoy stated that Eastern never made loans based on false sales or information and that it never treated loans to Reynolds Construction Company any differently. Stoy never knew of Eastern's permitting a loan on property which stood in the name of someone other than the real party in interest. The fact that Stoy did not specifically check the truthfulness of the credit reports or other documents relating to the loans does not indicate that Stoy did not rely on the veracity of the documents and the representation that a real sale was involved. Perhaps Eastern should make a more thorough check of credit reports and scrutinize minutely the purchase of a home to convince itself that the purchase indeed is real, but this more suspicious approach would certainly do nothing to enhance a bank's good will, nor would it help accelerate the already long and tedious process of purchasing a home. We cannot see then how a lack of inquisitiveness or an abundance of gullibility can negate a showing of reliance. If anything, the testimony showing that Eastern did not conduct an independent investigation of credit information, transactional information, and the documents relating thereto, seems to us to demonstrate Eastern's complete reliance upon the representations made to them by Reynolds, Stamp and their colleagues. In this day of business suspicion and perhaps over-cautious financial dealings it is rare to find a financial institution which follows the methods employed by Eastern; however, this is not indica-

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[9] Appellant Stamp was the agent involved in this case and Eastern had dealt with him on several previous occasions. (Trial tr. 561.)

tive of lack of reliance by the Association. It points, rather, to the trust and good faith Eastern exercised in dealings with those with whom they had previous financial transactions. Perhaps the approach which Eastern chose to follow would lead them down a path of thorns subjecting them to the wiles and deceits of those with high business acumen and make them unsuspecting prey for those with less regard for moral business dealings and decent business ethics. All of this leads us to believe that Eastern was indeed naive in its procedures and unsuspecting of the potential dangers lurking behind every loan transaction. It is a well-known maxim, however, that the law protects the unsuspecting as well as the wary.

The fact that Stoy at one point stated that these loans were made solely on the appraised value of the property, can hardly be taken as an admission that a loan would be approved if the documents were found to be totally based on lies. Harrison's testimony reiterated Stoy's assertion that no loans would be considered if they were known to be based on false information. The fact that Eastern relied *primarily* on the value of the property does not detract from a finding of reliance as long as the defrauded party's belief in the validity of the documents was a contributing influence in accomplishing the desired results. *Ciullo v. United States, supra,* 117 U.S. App. D.C. at 33, 325 F.2d at 229; *Gilmore v. United States,* 106 U.S. App. D.C. 344, 347, 273 F.2d 79, 82 (1959).

Appellants complain, though, that Harrison and Stoy spoke mostly in general terms and did not refer much to the 17 transactions. Why the Government chose this approach is not known to this court; however, based on the evidence we have set out, we can see no reason why the jury could not have reasonably made the inference necessary to find guilt beyond a reasonable doubt. Appellants in cross-examining Stoy and Harrison could certainly have, and in

fact did, elicit testimony relating to the 17 loan transactions.[10] This type of cross-examination would surely have tested the validity of their theory of the Association's general practice as well as satisfied any doubts they may have had with respect to the knowledge of Stoy and Harrison concerning the specific facts involved in our case.

V. Limitations on Cross-Examination

Another major error appellants allege relates to the trial judge's limitation on the cross-examination of Stoy and Harrison. They claim they were forbidden by the judge from testing on cross-examination the explanation given by Eastern's officers of its general lending procedures, by eliciting from them the procedure followed with respect to the 17 transactions listed in the indictment. It is without question that appellants had a right to cross-examine the bank officers concerning the 17 loan transactions, and if we were to find that the trial judge in fact denied them this right we would be duty-bound to reverse the convictions. Nowhere do we find that the trial judge blocked specific inquiry into the loans. In fact, the judge was quite liberal in allowing answers, twice over the objection of Government counsel, (*see* Trial tr. 127, 133) to questions on cross-examination dealing with the specific loan transactions involved in this indictment. Stoy was allowed to answer at least 25 questions on cross-examination dealing with the specific loan transactions.[11] In their claim that they were

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[10] Appellants claim they were unduly limited by the trial judge in their ability to cross-examine. We discuss this contention next.

[11] Some of the typical questions and answers are set out here.

Defense Counsel: Did you in 1962 in fact have knowledge that the 17 people named by Mr. Molenof and their wives did in fact exist?

Mr. Stoy: I personally didn't have any knowledge, no, sir. (Trial tr. 126.)

restricted in cross-examining Stoy about the specific loan transactions, the appellants rely solely, as they must, on the trial dialogue set forth in the margin.[12] The only restriction

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* * *

Defense Counsel: You testified, I believe, that the papers in these transactions came to Eastern Savings and Loan through an agent; is that correct?

Mr. Stoy: Yes, sir.

(Trial tr. 128.)

* * *

Defense Counsel: Did these appraisers in each of these 17 transactions place in your records a signed written apraisal?

Mr. Stoy: Yes, sir.

(Trial tr. 129–30.)

* * *

Defense Counsel: Could you tell the jury approximately how much you loaned on each of these transactions?

Mr. Stoy: I would say 80 percent at the most.

(Trial tr. 130.)

* * *

Defense Counsel: Now, I understand you to testify that the procedure at your institution at that time, the general procedure was as you outlined it here. Was the procedure that you followed in these particular cases the same procedure?

Mr. Stoy: To the best of my knowledge, the same procedures followed in all loans by Eastern.

(Trial tr. 131.)

[12] Defense Counsel: How were payments made on these mortgage transactions?

Mr. Stoy: I could not answer that, sir. I am not familiar with the payments.

Defense Counsel: Are you presently the secretary of Eastern Savings and Loan?

Mr. Stoy: Just the last two months.

Defense Counsel: Do you have access to the records of Eastern Savings and Loan?

Government Counsel: I object on the ground this is outside of the direct. He was asked about general practice.

of cross-examination concerning Eastern's general practice emanates solely from the manner in which Government counsel phrased his objection. Certainly nothing the judge said at trial indicated foreclosure of questioning concerning the specific loan transactions. It is frivolous for appellants to suggest that at that time they felt barred from eliciting testimony about the loans, inasmuch as the previous six answers (one over the objection of Government counsel) covered the specific loan transactions and moreover, the very next four answers were in response to questions concerning the particular transactions.[13]

With respect to the cross-examination of Harrison there are only two instances in the transcript remotely relevant to appellants' claim. The first occurs when, after a series of questions totaling five pages of transcript by one of the defense counsel who was asking questions about financial statements disclosing Reynolds' liabilities and assets, the trial judge cut off that line of inquiry as outside the scope of the direct examination. (Trial tr. 543.) The judge certainly had

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The Court: Sustained.
(Trial tr. 127–28.)

[13] In the District Court's opinion, written some seven and one-half months after the testimony, denying defendants' motions for post-trial relief, the trial judge mistakenly thought that in this instance he had prevented cross-examination with respect to the specific transactions. *See* Appendix to Appellant Reynolds' Brief at 32a. With all due respect, we feel the trial judge was apparently confused as to what he had in reality prevented at this point in the tedious and complicated trial. It appears he was merely exercising the "large measure of discretion", Baker v. United States, 131 U.S. App. D.C. 7, 36, 401 F.2d 958, 987 (1965), entrusted to him in limiting cross-examination to Eastern's policy of granting loans and not the paying of these loans. It is clear, though, as explained in the text, that appellants were not barred from asking about the 17 loan transactions.

a right to do so since not once was there any mention on direct examination of Reynolds' wealth, nor was there any focus on his financial statements. The judge then properly informed counsel that he was free to recall the witness to testify on these matters when it came time for the defense to present its case. It must be remembered that it is the trial judge's duty to see that the evidence is presented to the jury in as orderly and intelligible a manner as possible. To accomplish these ends the trial judge in limiting cross-examination must necessarily be entrusted with a great degree of discretion. *Baker v. United States, supra,* 131 U.S. App. D.C. at 36, 401 F.2d at 987 (1968); *United States v. Bender,* 218 F.2d 869, 874 (7th Cir. 1955); *Wright v. United States,* 87 U.S. App. D.C. 67, 68, 183 F.2d 821, 822 (1950). The court here was quite correct in not allowing the defense to cross-examine Harrison with respect to matters only relative to an affirmative defense and not brought into the case on direct. *See Baker v. United States, supra,* 131 U.S. App. D.C. at 36, 401 F.2d at 987. The other question put to Harrison that was found objectionable by the trial judge was:

> Defense Counsel: Mr. Harrison, did you have any conversations with regard to this case on last Friday?

(Trial tr. 545.) To understand the basis of this question we must refer to a discussion in court between counsel and the judge moments before the witness Harrison took the stand. (Trial tr. 525–526; 529–531.) Defense counsel at that point argued that Harrison should be excluded from testifying on the ground that Harrison had engaged in certain conversations with the prosecutor concerning the testimony of Stoy. The judge properly denied this motion, but said the witness' credibility could be tested by questioning him about any discussions he had with anyone else about the case. Defense counsel's question of Harrison then was aimed at impeaching his credibility by referring to the conversation he was supposed to have engaged in with the prosecutor concerning Stoy's earlier testimony. The limitation of undue

inquiry into collateral matters to test credibility is properly within the discretion of the trial judge. As this court said in *Lindsey v. United States*, 77 U.S. App. D.C. 1, 133 F.2d 368 (1942):

> [C]ontrol of cross-examination is within the discretion of the trial judge. . . .
>
> . . .
>
> [U]ndue inquiry into collateral matters to test credibility, and the like, [on] cross-examination is properly within the discretion of the trial judge, and there can be no reversal except for abuse.

77 U.S. App. D.C. at 2, 133 F.2d at 369. This position has been cited with approval. *See Wright v. United States, supra*, 87 U.S. App. D.C. at 68, 183 F.2d at 822. The trial judge here required, and reasonably so, that the defense show some sort of contradiction between the testimony of Stoy and Harrison before allowing the contradiction of Harrison in this manner. It was in this context then that the dialogue, which is set forth in the margin,[14] concerning the objection-

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[14] Counsel for Reynolds: Mr. Harrison, did you have any conversations with regard to this case on last Friday?
Government counsel: I object.
The Court: Sustained. Come to the bench.
(At the Bench)
The Court: Your questions can only be proper in the event he testifies to something that contradicts something that Mr. Stoy had said. Mr. Molenof never went into this. He testified according to what his——
Counsel for Reynolds: I believe he did. He testified they made loans on the basis of appraisals.
The Court: This witness never said anything to contradict him.
Counsel for Reynolds: If he knew they were false, they wouldn't make a loan. That is a direct contradiction, Your Honor.
The Court: Mr. Molenof didn't open it up.
Counsel for Reynolds: Your Honor, I certainly indicate this

able question propounded to Harrison, arose. Admittedly, the discussion we refer to in the margin is rather confusing, which perhaps is in part the result of a faulty transcript. However, it is clear that the discussion centered around whether or not there was sufficient contradiction between the witnesses' testimony to allow the type of attack defense counsel wished to make on the credibility of Harrison. If

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witness was influenced by the discussion of the testimony before this Court with Mr. Stoy. Now, his testimony is different than Mr. Stoy in that respect Mr. Stoy said appraisals. That is why we made the loan. By inference, the jury is clearly led to believe that had they known of these things, they would have made no loan. I think it is direct contradictory. [*Sic.*]

Government counsel: No contradiction for the simple reason that Stoy made a particular statement on rebuttal, and I have the transcript here, indicating they initially considered the application not knowing they contained false information or false sales——

Counsel for Reynolds: That contradicts Mr. Stoy's testimony.

Government counsel: It didn't contradict his testimony. He would not make a loan on false sales and false information. I don't think he contradicted him.

Counsel for Leigh: Your Honor, may I say he testified, and there was a general question as to what specific testimony related to the property, and that has never been touched.

The Court: It certainly hasn't. He has never been asked any question about any knowldege of any one of the 17 transactions.

Counsel for Dienelt: I got the same inference out of the question.

The Court: I can't help it. It might be an inference from a million other properties. The whole examination, the principal examination of this witness had to do with general practice of Eastern Savings and Loan, and not once did he testify to the 17 transactions. If he had, I would permit as indicated some challenge to the question as to his credibility. He had not gone into it. I will not permit it. I will stand on my ruling. (Trial tr. 545–47.)

defense counsel had wanted to ask the questions it now claims it was prevented from asking, we do not think the above discussion would have intimidated defense from further inquiry into the 17 specific loan transactions but merely diverted counsel from asking the witness about *conversations* with the prosecutor. As a matter of fact, only a few minutes later Harrison was asked and, with no objection from the judge or Government counsel, responded to questions concerning documents relating to two of the specific loan transactions. (Trial tr. 562–563.) Certainly at this point any trepidations defense counsel might possibly have had about delving into the 17 specific loan transactions were assuaged. In view of the above, we can find no abuse of discretion by the trial judge in handling the cross-examination.

VI. The District Judge's Refusal to Grant Appellants' Motion to Suppress Certain Evidence

The District Judge denied all motions to suppress evidence obtained by virtue of the interviews and examinations outlined above. He denied appellants' claims made under the Fourth Amendment on the ground that "the use of [a civil tax] statute to inspect books and records for both civil purposes and possible criminal prosecution does not constitute that fraud and deceit which characterize a search and seizure as unconstitutional." Brief for Appellant Reynolds at 22a. With regard to the Fifth and Sixth Amendment assertions, the District Judge held that suspects in criminal cases arising out of tax investigations are entitled to be advised of their constitutional rights "when the accusatory stage is reached and the adversary process begins to operate," Brief for Appellant Reynolds at 21a, but he asserted that this stage had not been reached with respect to Appellants Freeman and Rogers at the time of their interviews.

Let us examine the appellants' Fourth Amendment claim that their valid consent to the inspections and examinations under consideration in this case was lacking. It is important

to keep in mind the significant difference between the normal search made in a criminal case and the *search* made in a tax investigation. The typical criminal search is exemplified by a police officer knocking on the defendant's door, either figuratively or literally, thereby putting the occupant on notice as to the criminal nature of the search. The tax audit, on the other hand, is conducted by a *plainclothesman* of the Internal Revenue Service who is primarily interested in a civil matter; the taxpayer thus may be unaware of the possible criminal repercussions of his investigation. It is appellants' contention that this difference fundamentally affects the nature of the consent given to the search.

This contention is raised frequently in tax fraud cases, and an important consideration in many of these cases has been whether the audit had developed into a criminal investigation at the time the incriminating evidence was discovered. If evidence is uncovered in the so-called *first stage* of the investigation, "in which the agent has no suspicion of fraud beyond his normal awareness that fraud may be uncovered in any case under investigation," Note, *Fifth Amendment Right to Counsel in Federal Income Tax Investigations,* 19 STAN.L.REV. 1014, 1022 (1967), it is generally admitted without regard to circumstances. *See United States v. Spomar,* 339 F.2d 941 (7th Cir. 1964) *cert. denied,* 380 U.S. 975 (1965); *Hanson v. United States,* 186 F.2d 61 (8th Cir. 1950). Because there is no suspicion of criminal behavior at the time the investigation is made and because there is little chance that the audit will lead to criminal prosecution, Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid,* 76 YALE L.J. 1, 34–5 (1966), the courts hold that the taxpayer's consent was not obtained through fraud or misrepresentation.

Where the evidence is obtained during the *second stage,* "in which the agent does suspect fraud in the particular case at hand and is seeking to uncover evidence of wrongdoing

for a possible criminal prosecution," Note, *supra*, at 1022, there is some conflict in the decisions. The majority of the decided cases hold that the Government is under no duty to disclose the changed nature of its investigation, so evidence which is gathered during the *second stage* is admissible if valid consent was given during the *first stage*. *United States v. Sclafani*, 265 F.2d 408, 415 (2d Cir.) *cert. denied*, 360 U.S. 918 (1959); *see Turner v. United States*, 222 F.2d 926 (4th Cir. 1955); *United States v. Burdick*, 214 F.2d 768 (3rd Cir. 1954). A primary factor in these decisions was the fact that the revenue agent did not mislead the taxpayer at the time he obtained his consent. *See United States v. Wheeler*, 147 F.Supp. 945, 950 (E.D.Ky. 1957) *reversed and remanded on procedural grounds*, 256 F.2d 745 (3rd Cir. 1958). Another rationale given for this line of reasoning has been that the taxpayer must know that the civil audit might well ripen into a criminal prosecution. This reasoning is valid when applied to accountants, businessmen and other sophisticated taxpayers, but considering the very small number of civil cases that develop into criminal ones, it is questionable whether the typical taxpayer realizes the criminal implications of a tax audit. Duke, *supra*, at 36. *See generally United States v. Sclafani, supra*, 265 F.2d at 414–415. Finally, at least one court has felt it would be impossible for the Government "to keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead." *United States v. Sclafani, supra*, 265 F.2d at 415. However, we feel that generally it is within the Government's capabilities to know when its investigations have become criminal.

A few courts have held that any evidence obtained in the *second stage* must be suppressed. *See Application of Bodkin*, 165 F.Supp. 25 (E.D.N.Y. 1958); *United States v. Guerrina*, 112 F.Supp. 126 (E.D.Pa. 1953), *modified* 126 F.Supp. 609 (E.D.Pa. 1955). These courts have reasoned that the taxpayer intended to consent only to a search for evidence of

civil liability and that he had no intention of consenting to the additional search for evidence of fraud.

A few other cases have established a middle ground between *Sclafani* and *Guerrina*. The courts deciding these cases have looked at the particular facts involved in the tax investigation in order to determine whether the scope of the investigation exceeded that necessary for a civil tax audit. *United States v. Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955), or that the Internal Revenue agents had misled the taxpayer to believe the audit remained exclusively civil. *United States v. Wolrich*, 129 F.Supp. 528 (S.D.N.Y. 1955). Although these cases were rejected in the *Sclafani* opinion, 265 F.2d at 414, *Sclafani* really did not undertake a careful analysis of these cases. It should be noted that *Wolrich* and *Lipshitz* are not necessarily inconsistent with the holding in *Sclafani*.

The case before us presents a factual situation different from either the *first stage* or *second stage* cases. Here, the Internal Revenue agents were conducting valid civil tax audits of the principals in our case, but, it is clear they were also seeking, at least tangentially, evidence of criminal behavior from the inception of the investigations. To our knowledge there is only one case with the same factual pattern, *United States v. Wheeler, supra*. In *Wheeler*, the Court held that the evidence was seized in violation of the Fourth Amendment. The Court distinguished the cases where evidence was seized during the *second stage* on the ground that in those cases the agent conducting the search had not misstated his purpose when he initially obtained consent during the *first stage*, whereas the agent in the case before it had misrepresented his purpose to some extent. *United States v. Wheeler, supra*, 149 F.Supp. at 450. There are, however, a few cases which have held that it is permissible under another portion of 26 U.S.C. § 7602 [15] to require a taxpayer to

[15] **§ 7602. Examination of books and witnesses**

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining

produce his records even when the investigation is criminal as well as civil, *McGarry v. Riley*, 363 F.2d 421 (1st Cir. 1966); *Wild v. United States*, 362 F.2d 206 (9th Cir. 1966); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956); and these cases tend to indicate that evidence obtained in such an investigation as a result of the taxpayer's not wholly-informed consent would be admissible. One rationale given for these decisions has been that the relevant language of section 7602 does not state that the procedure can be used only in investigations which are exclusively civil, and it can thus be used in investigations which are both civil and criminal. *Boren* v. *Tucker, supra*, at 772.

We believe the reasoning in these cases to be sound and well considered. There is no disputing the fact that section 7602 is subordinate to the Fourth Amendment; it is this fact which leads us to believe that the intent of Congress was to

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the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.
26 U.S.C. § 7602 (1964).

provide for use of that statute within the mandates of the Constitution. As each of the cases upholding a record summons in joint civil and criminal investigations points out, the possibility of a criminal action germinating from a civil audit is inherent in the procedure. *See McGarry v. Riley, supra,* at 424; *Boren v. Tucker, supra,* at 772. This proposition, however, cannot be applied to non-tax-related crimes. In our case, the investigation was of returns, books and other documents which belonged to a sophisticated businessman or professional. The appellants were not the uninitiated who could be said to be unaware of the possible consequences of a civil tax audit. As builders, accountants, attorneys and people engaged in the real estate industry they were acutely aware of the possibilities of a criminal prosecution stemming from the civil audit.

In our opinion, neither *Wheeler* nor the *record summons* cases are clearly determinative of our case and we must analyze the reasoning of the *second stage* cases to reach a solution. To begin with, let us examine the applicability of the "middle ground" cases. These cases are based on the sound principle that any misleading elements other than those inherent in the nature of a tax investigation are certain to affect the validity of the consent given. Our task will be simplified if the specific facts of the examinations and inspections at issue here indicate the presence or absence of additional misleading statements.

We consider first the audit of Reynolds Construction Company by Revenue Agent Evangelist. George R. Steele, an employee of the company consented to this audit and one factor to be examined in determining whether he was "deluded" into giving his consent is what Revenue Agent Evangelist told him the purpose of the search was. If Evangelist assured him it was simply a routine civil audit, he would have been misleading Steele to some extent since the audit was at least in part a search for criminal evidence. *See United*

States v. Wolrich, supra. The testimony on this point is in conflict. Steele contends that Evangelist told him it was a *routine* tax audit. (J.A. 34.) Evangelist, on the other hand, contends that he did not use the word *"routine"*. (J.A. 37.) In testimony, in fact, Agent Evangelist stated that as a practice he "never used the word *routine* in any audit" he performed. (J.A. 37, emphasis added.) Taking this testimony into account as being explanatory of Evangelist's regular practice and considering that Steele was an accountant can only lead us to the conclusion that as a man of considerable experience in the world of finance Steele was aware of the potential criminal aspects of the civil audit. This would be so even if Evangelist said nothing about the partial criminal nature of his investigation. It is not possible for us to conceive of a situation in which a firm's accountant would likely be put off his guard by a Government agent seeking to inspect the firm's financial books and records.

In determining the validity of Steele's consent we must consider whether Evangelist's examination was within the permissible scope of a civil tax audit. If the examination was beyond the scope of the civil audit then it could be said that it was beyond the scope of Steele's consent. *See United States v. Lipshitz, supra.* We do not believe that in light of the facts of this case, Evangelist exceeded the proper bounds of a civil audit. While he was testifying Evangelist stated that "one of [his] duties was to obtain all of the financial transactions between Reynolds and Leigh." (J.A. 41; *see also* J.A. 47, 51), and that he was to do so because Reynolds was suspected of bribing Leigh. Pursuant to his instructions Evangelist obtained sales contracts and refinancing statements pertaining to the "straw" transactions here at issue. (J.A. 43.) *Each of these documents was obtained from George Steele,* Reynolds' accountant, who could have questioned the scope of Evangelist's investigation at any time. We are not dealing here with a situation in which the Government obtained its information by stealing through the

night; on the contrary, all of the information in question was examined during the civil audit and unquestionably pertained to that audit. If Steele felt at any time that Evangelist had exceeded the bounds of his audit in making a given request for records he could have refused to make such records available to him. According to Steele's own testimony Evangelist worked with him in the same room (J.A. 30), and Steele had the opportunity to watch him and speak with him at any time he desired during the course of the audit. Steele understood Evangelist's requests for records and knew the purpose of his visit; if he believed for one moment that Evangelist was not in fact conducting a civil audit or if he was not satisfied with the nature of his requests, or if he thought that his requests were beyond the bounds of the civil audit, he could have acted. He never chose to do so. Thus, the investigation of Reynolds Construction by Evangelist was within the proper scope of the civil audit and the evidence obtained in this search should not have been suppressed.[16] Special Agent McElroy obviously acted innocently in making the statements that he did, not realizing that they could mislead Rogers or intending to do so. Rogers' consent to the inspection of the partnership records in his possession was valid and evidence obtained as a result of that inspection should not have been suppressed. When he began his investigation McElroy was apparently unaware of Rogers' role in the drama that was about to unfold. Rogers was in a better position at the time than McElroy to postulate on his own possible future involvement. McElroy did not fully inform Rogers of the nature of the Leigh criminal investigation; however, he certainly had no duty to do so. Rogers was informed that Leigh was being investigated for tax fraud, although no mention was made of bribery.

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[16] Since this evidence was admissible against Reynolds we need not reach the question of whether the other defendants had standing to raise the issue of the legality of the search.

We, likewise, believe that the audits of both Freeman and Rogers were untainted. The investigation of Freeman stemmed directly from Evangelist's findings in his audit of Reynolds, and at the time of this search it is not possible to determine which information uncovered would be classed as civil and which criminal. The information stemmed from a civil audit and thus will not qualify as "fruit of the poisonous tree." We do not believe that the investigation of Freeman exceeded the proper bounds of a civil tax audit. The Rogers investigation, as we said above, came after McElroy explained his investigation and purpose. He knew of all of the possible ramifications of this search prior to granting his consent. Furthermore, the Government was not at the time seeking evidence to incriminate Rogers. When such evidence was uncovered, however, it was admissible and there is no reason for its suppression.

Special Agent McElroy's action in obtaining records of the Leigh-Rogers partnership presents a fact pattern quite different from the tax investigation of the Reynolds Construction Company. McElroy notified Leigh that he was engaged in a criminal investigation; the difficulty is that he assured Rogers he was investigating only Leigh. As McElroy testified:

> I was not investigating him [Rogers], I told him I was not investigating him, and I also tried to make it clear to him that I definitely was not doing it.

(Trial tr. 126.) The question presented is thus whether this statement was misleading to the extent that it vitiates Rogers' consent to the search. We feel that it was not. McElroy did not say that any evidence obtained would not be used against Rogers, and while McElroy was only investigating Leigh at the time Rogers was on notice as to any joint transactions in which he participated with Leigh.

Finally, we consider the initial search involved in this case, that is, the tax examination of defendant Leigh which

took place prior to his being informed of the criminal nature of the investigation in January 1964.[17] While we have not found evidence of misleading circumstances with regard to the searches discussed above, we find even less evidence of potentially questionable events and conduct with reference to this search. The record shows that Revenue Agent Hansell treated the examination as a routine audit (Trial tr. 232), and we have no indication that the scope of the examination exceeded that of a routine audit in any way. Hansell refrained from inspecting the settlement files pertaining to the "straw" transactions until Leigh had been notified that he was a criminal suspect. (Trial tr. 218–224.) In addition, there were no special agents operating behind the scenes while Hansell concluded the audit. (Trial tr. 230.) Hansell did tell Leigh that the investigation was a routine audit and did not indicate to him that it was initiated as the result of an informer's tip alleging that Leigh was involved in accepting certain bribes. (Trial tr. 290–291.) We see no reason why Hansell should have said more. *See Wild v. United States, supra; Boren v. Tucker, supra; McGarry v. Riley, supra.*

We do not feel that this partial withholding by Hansell vitiates Leigh's consent in any manner. The investigation of Leigh was potentially criminal in nature but when the search was made there was nothing in the hands of the Government which substantiated the information provided by the informer. When the Government is presented with information by an informer in a case as complicated as the case at bar it would be a mistake for them to proceed with the matter as a "criminal" prosecution until there was time to investigate all of the allegations. No one suggests that

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[17] While Leigh did not appeal his conviction we feel that it is important to discuss the search of his records, since any error here could be prejudicial to all of the other appellants because the balance of the Project investigation stemmed largely from findings here.

the Government should have approached the grand jury for an indictment at this stage; nor is there any suggestion that the matter should have been handled by a special agent at this stage. The Government's sole information was a tip from an informer. There is no information as to the reliability of the source. It was unnecessary to bring these facts to Leigh's attention since if they were true, disclosure of a potential investigation at this time could unnecessarily hamper and inhibit the Government's investigation, and if false, the suggestion of participation in illegal activities would have been uncalled for based on the naked allegations of an informer without solid investigative substantiation.

We do not comment on the reasoning of the *Wheeler* court; as we do not believe that case to be applicable to the case at bar. Indeed, it is a close question as to whether evidence obtained in the *second stage* of a typical tax investigation is admissible when there is no notification to the taxpayer of the partial civil-partial criminal foundation for the investigation. The common *second stage* case situation involves an agent obtaining consent in the first stage without any misrepresentations to the taxpayer. This is precisely the close question we find in the instant case. When dealing with persons as sophisticated as the defendants and appellants in our case it is not possible to believe that they lacked full realization that the civil tax audit could ripen into a tax fraud investigation and, in light of these acts, a criminal non-tax probe. While the normal taxpayer might not suspect the possibilities of this occurring we are not dealing with the ordinary taxpayer but rather with people well versed in finance, taxation and the law.

For these reasons, then, we hold the evidence obtained as a result of the examination of Leigh prior to his being advised of his rights as a criminal suspect admissible.

VII. The Fifth and Sixth Amendment Claims

Lastly, appellants Rogers and Freeman argued that the interviews conducted by the Internal Revenue agents of them were conducted in violation of both the Fifth and Sixth Amendments to the Constitution because appellants were not given the *Miranda* warnings. We note, and there is little disagreement, that *Miranda* warnings are not required at the outset of every civil tax audit as a condition precedent to the introduction of information elicited from a taxpayer. *See Spinney v. United States*, 385 F.2d 908 (1st Cir. 1967) *cert. denied*, 390 U.S. 921 (1968); *Frohmann v. United States*, 380 F.2d 832 (8th Cir.) *cert. denied*, 389 U.S. 976 (1967); *Schlinsky v. United States*, 379 F.2d 735 (1st Cir.) *cert. denied*, 389 U.S. 920 (1967); *United States v. Maius*, 378 F.2d 716 (6th Cir.) *cert. denied*, 389 U.S. 905 (1967); *United States v. Mancuso*, 378 F.2d 612, *modified*, 387 F.2d 376 (4th Cir. 1967) *cert. denied*, 390 U.S. 955 (1968); *Selinger v. Bigler*, 377 F.2d 542 (9th Cir.) *cert. denied*, 389 U.S. 904 (1967); *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967); *Rickey v. United States*, 360 F.2d 32 (9th Cir.) *cert. denied*, 385 U.S. 835 (1966); *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965) *cert. denied*, 384 U.S. 1011 (1966); *United States v. Spomar supra; United States v. Jaskiewicz*, 278 F.Supp. 525 (E.D.Pa. 1968); *United States v. Mackiewicz*, 274 F.Supp. 805 (D. Conn. 1967); *United States v. Neves*, 269 F.Supp. 158 (S.D.N.Y. 1967); *United States v. Gleason*, 265 F.Supp. 880 (S.D.N.Y. 1967); *United States v. Hill*, 260 F.Supp. 139 (S.D.Cal. 1966); *United States v. Fiore*, 258 F.Supp. 435 (W.D. Pa. 1966); Note, *supra;* Duke, *supra.* *In Mathis v. United States*, 391 U.S. 1 (1968) the Court held: "We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person *in custody.*" (Emphasis added.) *Id.* at 4. The decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964) certainly do not re-

quire that warnings be given in this situation. As *Mathis* stated, these decisions only deal with situations in which an individual is in custody. *See Miranda, supra,* 384 U.S. at 467, 471, 477. Moreover, there is little need for these warnings, for, as we have said the possibility that the audit will turn into a criminal investigation is very small. Finally, it appears that the tax laws will be better administered and the rights of individuals will receive more protection if the so-called *Miranda* warnings are given with a degree of selectivity rather than uniformly. *See* Duke, *supra,* at 38–39.

The question thus presented is, if *Miranda* warnings are to be given at least at some stage of some tax investigations, must they have been given to Rogers and Freeman at the time in question here? We do not believe so. The *Miranda* warnings were primarily designed to protect an individual from physical or mental coercion exerted in order to extract a confession from him. The facts surrounding the interviews of Rogers and Freeman do not indicate that there was any coercion present. Neither was in custody or detained in any way, and the individuals conducting the interviews were revenue agents who presumably were not trained in the interrogation techniques condemned by the Supreme Court in *Miranda.* It is our view that the trial judge handled the entire *Miranda* issue with great care and sensitivity, and we both accept and endorse the conclusions of the trial judge on this point. *See* Appendix to Brief of Appellant Reynolds at 12a. Given these circumstances, we do not believe Rogers and Freeman were entitled to the *Miranda* warnings at the times they suggest.

There remains, however, the question whether information obtained in the interviews with Rogers and Freeman was inadmissible under the Fifth Amendment because it was not given voluntarily. This question is to be resolved through the use of the same principles discussed above with regard to the Fourth Amendment, for in both instances the issue is

whether the taxpayer was "deluded" into acquiescing. The Fifth Amendment would in fact appear to be applicable to both situations, because the evidence obtained from a taxpayer during an examination of his books should probably be considered testimonial. *See* Note, *supra*, at 1021–22.

Applying the principles enunciated above with regard to the Fourth Amendment, it is evident that the information which Rogers and Freeman related to the Internal Revenue agents was given of their own free accord and was fully voluntary. Both appellants were fully apprised of the transactions in which they were involved and knew of the possible consequences of the civil tax audit. Those involved in criminal activities cannot volunteer to give information concerning cohorts in the same transaction and then claim to be unaware of the true nature of an investigation when the investigators' attention is turned in their direction. When McElroy approached Rogers he was not under suspicion; when Freeman spoke with Evangelist he was the subject of a valid civil tax audit. Consequently, evidence obtained from these interviews, as well as that gathered in the inspections and interviews we have discussed above were correctly admitted into evidence by the trial judge. Finding no error the conviction of the District Court is

Affirmed.

BAZELON, *Chief Judge, concurring:* The fundamental office of *Miranda v. Arizona*[1] is to insure that a suspect's cooperation with the police does not rest on ignorance or a mistaken understanding of his constitutional rights. In requiring disclosure to the suspect that he need not answer any questions, that his answers can be used against him, and that he has a right to the assistance of counsel, the Supreme Court attemped to guarantee that the poor and the uninformed would understand their rights no less than the sophisticated and the affluent, and that waivers of their rights would not proceed from ignorance. The decision was not designed to establish new rights, but rather to insure that the exercise of pre-existing rights would not turn solely on the intellectual or financial resources of the suspect.

No one has ever pretended that *Miranda*'s crucial and essentially uncomplicated objective could be easily or quickly achieved. After all, a defendant who was ignorant of his rights before hearing the *Miranda* warnings may easily misunderstand them if they are "explained" in a grudging or confusing manner, or if they are offered in a context so rank with hostility and coercion that the suspect immediately recognizes them as sham. Without the sustained vigilance and probing of the lower courts, wealth and intelligence will continue to control the exercise of fundamental rights.

After more than five years of experience with *Miranda* it seems clear that the critical struggle is not so much to insure that the warnings will be given, as to guard against the subtle dismantling of *Miranda* by those who would give credit to waivers which are neither knowing nor intelligent. This case presents a *Miranda* question far removed from the flash point of the current controversy. Indeed, some might argue that *Miranda* was not even designed to provide additional protection to this type of defendant. Its principal ob-

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[1] 384 U.S. 436 (1966).

jective, it could be said, was to guarantee that all defendants would be able to exercise the same rights which wealthy and informed defendants have long possessed. But while judicial vigilance is most required where the suspect lacks the experience, mental capacity, or legal advice to make an informed appraisal of his rights, it bears emphasis that *Miranda* cannot be gutted or treated cavalierly where the suspect is rich and powerful and sheltered by the high-priced assistance of counsel. *Miranda* established an across-the-board prophylactic rule which rests on the assumption that all suspects should understand their rights and that no one should be presumed to have the necessary understanding in advance of hearing his rights. That rule is fully applicable to this case.[3]

I am in complete agreement with the conclusion of the Court and of the court below that each defendant was advised of his rights as soon as a general investigation gave way to a search for information that would support a criminal charge against him. In addition to the court's analysis, I only wish to add that the record in this case makes it clear that the suspects were not only given the necessary warnings, but also that those warnings—and the rights they described—were fully understood. This Court is not, therefore, compelled to rely on ambiguities, strained inferences or

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[3] Because of the special nature of an income tax fraud investigation the *Miranda* warnings have special significance here notwithstanding the sophistication of the defendants. For no matter how familiar they were with their rights, their exercise of those rights may have depended in part on their understanding of the government's intentions. Thus, a taxpayer may be willing to cooperate with a routine tax audit while he would have withheld his cooperation if he had understood that the government had already decided to press a criminal charge. Yet until he receives the *Miranda* warnings the taxpayer may have little understanding of the peril of his position.

flimsy presumptions in concluding that *Miranda*'s objectives were realized. The distressing irony, of course, is that we rarely enjoy such assurance in cases where the defendants are even more in need of *Miranda*'s protection.

APPENDIX C

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

* * * * *

§ 22-1301. False pretenses.

Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; or, if less than that sum,

shall be fined not more than $200 or imprisoned for not more than one year, or both. Any person who obtains any lodging, food, or accommodation at an inn, boarding-house, or lodging-house, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at such an inn, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at such an inn, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, accommodation, or lodging, shall be deemed guilty of a misdemeanor, and upon conviction thereof in the District of Columbia Court of General Sessions be fined not more than $100 or imprisoned not more than six months, or both, in the discretion of said court. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, §842; June 30, 1902, 32 Stat. 535, ch. 1329; Aug. 12, 1937, 50 Stat. 628, ch. 599; Apr. 1, 1942, 56 Stat. 190, ch. 207, §1; June 29, 1953, 67 Stat. 99, ch. 159, §215(e); July 8, 1963, 77 Stat. 77, Pub. L. 88-60, §1.)

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§ 22-1401. Forgery.

Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, §843.)

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[Amendment IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched; and the persons or things to be seized.

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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